DOCUMENT RESUME

ED 141 636 CE 011 980

AUTHOR Kovarsky, Irving
TITLE Discrimination in Employment.
INSTITUTION Iowa Univ., Iowa City. Center for Labor and Management.
PUB DATE 76
NOTE 248p.
AVAILABLE FROM Center for Labor and Management, College of Business Administration, Phillips Hall, The University of Iowa, Iowa City, Iowa 52242 ($5.00)

EDRS PRICE MF-$0.83 HC-$12.71 Plus Postage.
DESCRIPTORS Age; Constitutional Law; Court Litigation; Discriminatory Attitudes (Social); *Discriminatory Legislation; *Employment Practices; Employment Problems; Equal Opportunities (Jobs); Federal Legislation; Health; Public Policy; *Racial Discrimination; *Religious Discrimination; *Sex Discrimination; *Social Discrimination; State Legislation; Textbooks
IDENTIFIERS United States

ABSTRACT

Intended as a guide on discrimination problems and issues for students and practitioners in the area of employment relations, this book interrelates historical, religious, economic, medical, and sociological factors surrounding racial, religious, national, sex, age, and physical and mental discrimination to explain discrimination in employment. The chapters in the first half of the book on racial and religious discrimination develop the background related to the roots of discrimination; discuss the relationship between traditional economic theory and discrimination issues; analyze Court interpretations of the Constitution; and examine the development and application of Federal policy related to discrimination through a discussion of Federal labor laws and executive orders, and State and Federal fair employment legislation. The remainder of the book focuses on sex, age, health, and other specific types of discrimination such as experienced by homosexuals and ex-convicts, each in turn being discussed in terms of history and applicable legislation. Supreme Court decisions in six cases, a bibliography, and publications of the Center for Labor and Management are appended. (EM)

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DISCRIMINATION IN EMPLOYMENT

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ACKNOWLEDGMENTS

My thanks to Dr. Joel Kovarsky, Duke Medical Center, Durham, North Carolina, for his help in developing the medical material. In addition, I would like to thank P. Andiappan, Ph.D. candidate, The University of Iowa, for generally aiding in this undertaking.

Irving Kovarsky

FOREWORD

The past decade has seen a proliferation of literature related to the issues of discrimination in employment. Much of that literature focuses on one particular dimension or facet of the general problem of employment discrimination. In this publication the author seeks to bring together, in one source, an analysis of the major elements related to discrimination issues.

Professor Kovarsky first develops the background related to the roots of discrimination, including the role of racial and religious history. The author further develops this foundation with a discussion of the relationship between traditional economic theory and discrimination issues. Court interpretation of the Constitution is analyzed as another element in this general framework.

The author then looks separately at the development and application of federal policy related to discrimination through a discussion of federal labor laws and executive orders, and state and federal fair employment legislation. The remainder of this work focuses on sex, age, health, and other specific types of discrimination, each in turn being discussed in terms of history and applicable legislation.

This publication is intended as a practical guide to discrimination problem areas and issues for students, practitioners in the area of employment relations, and others with an interest in this field.

The Center for Labor and Management expresses its appreciation to Lorena Lovetinsky and Vi Kuebler for their most capable assistance in the production of this manuscript.

Thomas P. Gilroy
Associate Professor
Center for Labor and Management
The University of Iowa

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AND THERE WAS A BEGINNING

Chapter I

THE COMMON THREAD

Historians have been, on the whole, uncritical of public and private discrimination until recently, portraying in glowing terms the United States as the land of opportunity, fair play, and freedom for all. A myth widely spread was the welcome accorded all, a haven for those seeking religious freedom and economic opportunity. When racial minorities faced economic hardship, their lack of drive, education, or skill was considered responsible and not white intolerance. For the willing, skillful, and educated, perseverance and hard work would lead to success. While economic depression temporarily retarded opportunity, hard work in the long run would be rewarded. Only since World War II has there been widespread acknowledgment that racial and religious hostility was commonplace and economic opportunity denied to many, even the educated and willing. Women, on the other hand, were being protected for their own good, nature requiring a different role for them than for men. Obviously it was a role established by men and not women.

While the overall record of racial and religious tolerance in the United States may have been better than elsewhere, to some extent, it was a spotty record at best. For many white Christians, the United States was indeed a religious haven, and economic success was possible. For the Jew, economic success was possible in spite of considerable anti-Semitism that increased after the Civil War. But for many—the Indian, black, Mexican-American, and others—the white controlled environment was hostile, seldom a land of opportunity. Of more recent concern has been the economic discrimination experienced by women, older workers, and those suffering physical and mental handicaps. Many forms of employment discrimination—religious, racial, nationality, sex, age, or disability—are not indigenous to the United States; ancient societies and religions throughout the world were discriminatory. For example, while blacks today rightfully point to the prejudice of white America, the past roles of black Africans and Muslims profiting from slavery are ignored. Black sales are evidence of tribal prejudice and economic inhumanity, unmentioned by current critics of white inhumanity. That all organized religions were guilty to some degree of religious, racial, and sexual discrimination, and even some intolerance for the mentally and physically handicapped, were also ignored or inadequately evaluated. Religious dogma, reflecting fear of outsiders, competition, and the push for ecclesiastical power, fanned intolerance and helped to perpetuate discrimination for centuries. While there is some ecumenical spirit today, it is a recent development.

European colonists settling North America were Catholic or affiliated with one of the Protestant limbs. Since many settlers faced religious hostility in Europe, a myth was circulated that all God-fearing people were acceptable in the colonies. These migrants in fact were often as intolerant as those residing in Europe—witness the hostility to Indians, blacks, Mexican-Americans, and Jews. Religious hostility to the Jew was brought from Europe, inherent in Catholic and Protestant doctrine because of the crucifixion of Christ. Discrimination against the Indian and black, labeled heathens, spread rapidly in the white colonies, aimed at people with life-styles shaped by foreign cultures. Varying degrees of tolerance practiced in the colonies were reserved for white Europeans.

Perhaps less apparent was the discrimination pushed by economic theorists and legal practitioners. Religion, politics, and law were not to be intermingled, isolation in these functional areas required by the United States Constitution as a means of maximizing personal freedom, while economic theorists most often preached freedom in the marketplace, questioning the past value of religious and public regulation. While some economists questioned laissez faire, the most influential usually endorsed it as the eleventh commandment. Darwin's scientific theory of evolution and survival of the fittest meshed well with Protestant theology and the explanations of Smith and Malthus; life in early America was harsh. Reverend Malthus, well-known for his theory of population growth and food supply, the first increasing geometrically, the latter only increasing arithmetically, must have been influenced by biblical concepts. European clergymen promised reward to the poor in the afterlife, acknowledging man's limited ability to improve his standard of living on earth. While Adam Smith was more hopeful than Malthus, Darwin's theory of the survival of the fittest was inspired by the economic theory of Malthus. Darwin also believed in genetic inheritance, and the prejudice found in biblical literature was now backed by scientific data. To this day, economists point out that the mass redistribution of all wealth would only make paupers out of everyone. Ignored by these economists—Marx is an exception—is the fact that the poor nations kept getting poorer while a few businessmen from rich nations grew wealthier. Ignored was the possibility that if wealth were better distributed there might have been less mental retardation (some believe that diet affects the mind). Much of the classical economics described conditions in England and Europe and was less relevant or descriptive of the United States. While 40,000 black slaves could be found in the fashionable homes of England, they were not an integral part of the industrial or agricultural work force.

Slavery, consequently, ended earlier and with relative ease in England. Slavery also expired noiselessly in the northern areas of the United States where family farming was a reality.

England during the eighteenth and nineteenth centuries dominated the world. England being the home base of social Darwinism and classical economic theory, the English immigrant in the colonies was surrounded by evidence of the superiority of his way of life; it is difficult to argue with success. The superiority of the Anglo-Saxon, whatever his shortcomings, must be acknowledged and outsiders molded to fit into a preconceived framework. English superiority was quickly established in the colonies when the Indian was quickly and efficiently dispersed. A successful homogeneous race is blessed from Above, indicating the inferior social and economic role that others must play. Color is probably the simplest means of assigning permanent leadership and subservient roles. While color was not the basis of the caste system in India—Brahmin, Kshatriya, Vaishya, and Shudra—it was a convenient means of drawing caste lines in the United States. The British in India even felt superior to the Brahmin.

As subsequently used, discrimination, all types, is defined as intentional, institutional, or unconscious prejudice unsupported by "scientific" data. All decision-makers, whether businessmen, union leaders, ministers, legislators, judges, or arbitrators, discriminate, taking a position that supports or injures some one or group. It is only natural that those injured by decision-makers claim inequity, foul play, or discrimination. All nations or large groups make ethical decisions that deflate the individual and promote the group. In spite of majority will, whether by institutional or public decision, employment discrimination is not tolerable. In the legal arena, the theoretical line is whether the individual or group is unnecessarily or unreasonably stepped upon. Because knowledge and education expand, the political and legal lines drawn must change, but unintentional discrimination is institutionalized unless theorists and decision-makers shift positions. It seems that the 1930 depression and World War II signaled, at last, the need for change.

Knowledge expands slowly as one glimmer of truth leads to another. Often, the new findings must be reexamined and refined. Due to innate prejudice, difficulty of change, lethargy, etc., private and public institutions adopt contradictory and discriminatory positions. Where speculation dominates and evidence is contradictory—like religion, economics, and law—sorting fact from fiction is near impossible. Changes in religious doctrine, economic theory, and law come slowly, if at all. The purpose of this book is to highlight these contradictions and prejudices as they affected employment, emphasizing changes and responses.

An attempt has been made to portray the discrimination practiced or encouraged by institutions, public and private, and individuals. If moral and economic theories are widely accepted, individuals, employers, and unions are influenced thereby. For example, religion and the home can be viewed as the first defenses, the bulwark in fact, against wrongdoing, immoral or criminal. The second line of defense is the public agency, law enforcement officers, and judges. If the moral pacesetter, religion, condones or encourages discrimination and economists ignore it, judicial thinking will follow the line of least resistance. While public policy is the focal point for this undertaking, the underpinnings, religion and economics, explain much of the historical and current judicial attitude toward employment discrimination. Hopefully, the roles played by all are assessed accurately. In some instances, the discriminatory contributions of organized religion and economic theorists have been soft-pedaled or ignored, heaping scorn only on the political and legal systems.

In a nutshell, historical, religious, economic, medical, sociological, and legal factors surrounding racial, religious, national, sex, age, and physical and mental discrimination will be interrelated to explain discrimination in employment. An attempt will also be made to pinpoint some segments of our society, ex-convicts and homosexuals, who may be in need of greater political and legislative protection than currently accorded. Court, administrative, and arbitration decisions will be examined to highlight current public policy and to determine effectiveness. The constantly expanding public interest in "social problems" and search for satisfactory solutions point to the possibility of change in the near future in areas where need is exhibited.

RACIAL AND RELIGIOUS DISCRIMINATION

Chapter II

RACIAL AND RELIGIOUS HISTORY

The God of the distant past, portrayed as wrathful, revengeful, and unforgiving, has been "enlightened" as understanding and tolerance increased. Religious leaders of the twentieth century, particularly since 1930, are more responsive to social criticism, sometimes taking their cue—call it down-to-earth revelation—from Supreme Court decisions and violence in the streets. That today's religious leaders are not the influential moral pacesetters of the past is apparent. Perhaps religious leaders forfeited the right to claim moral leadership, by banking too heavily on outmoded doctrine developed in the past and by failing to look at the streets. War and mass education brought forth new influences, and religious leaders, no longer an exclusive educated elite, unaware or ignoring new data and interpretation, lost their influence. While some called for the elimination of racial and religious discrimination, too many clung to the past. Religious interpretation is difficult to change, and activism depresses many clergymen.

Where does one begin to spotlight the racial and religious cruelty tolerated for so many centuries? Perhaps ancients banding together for self-protection is the proper starting point. Or perhaps the fear of the supernatural is the proper beginning. The recorded history of mankind and religion is intertwined and is probably as good a starting point as any. Institutionalized religions established ground rules to protect their followers and way of life, leaders and philosophers establishing superior gods and the inferiority of other bands and religions. In this fashion, groups developed inner strength and attitudes of superiority. Especially when religious and social customs and physiogomy differ considerably do outsiders pose a greater threat. Should one religion or race threaten another, the righteous, certain that God is on their side, call upon Him, while wrongdoers are vilified.

Like the citing of precedent by lawyers and judges, Hebraic and Christian doctrine can be cited to support any point of view, especially when taken out of context and not placed in historical perspective. That there is constitutional, biblical, and interpretative precedent for racial and religious intolerance is clear if isolated passages are cited and past interpretations, even if proven erroneous, are not challenged and changed. The desire or even need for brotherly love, while verbally accorded high social priority, can be ignored if religious doctrine is treated other than a history of mankind. Frequently cited as religious support for hostility is the curse Noah placed upon his son Ham who followed the ways of the Caananites, threatening the existence of the Israelites. The other sons of Noah, Shem the Israelite and Japheth the Aryan, are implicitly favored by the curse placed upon Ham, the black son. Later, the range of the curse is enlarged to include the descendants of Ham, possibly to protect the Israelites from enemies.

Accepting the curse placed by Noah upon Ham as authentic religion and history, it seems unlikely that Noah would perceive Ham as the progenitor of the black race. The curse, in all probability, was later altered to include the descendants of Ham to protect the Israelites from black marauders. Yahweh, the Hebrew God, is an all powerful god; blacks favoring other gods and threatening the Israelite life-style are consequently labeled inferior.

Even if Ham is the father of the black race, would Yahweh, an enlightened, moral god, curse eternally an entire race because of the indiscretion of one or a few blacks? This is questionable, at least for those living today. Much of the Jewish religious history is too humane to accept the notion that Noah condemned forever all black people. Because the branches of the developing nations fall from the same tree, Noah, it is difficult to accept religious interpretation soaked in hatred and fear. Unfortunately, as this form of hostility is passed from generation to generation, support is established for inhumanity more difficult to reverse than a bad Supreme Court decision. Segregationists and racists to this day cite the curse of Noah to justify white intolerance and black inferiority.

The religion exported from Western Europe into the eastern colonies was essentially Protestant, building upon the Old Testament. In the South, where black slavery later became the backbone of an agricultural economy, few whites were Catholic or Jew. For proper understanding, the Protestantism brought to the colonies from England should be analyzed in the light of the ferocious warfare between the Welsh, Irish, Scot, and Anglo-Saxon; only after extended blood-letting was England unified. If hatred and warfare is commonplace among white people essentially homogeneous, Indians and blacks, identified as heathens, are likely to face equal or greater hostility. And if Indians resist the dominance and Protestantism of England, a superior religion, the Bible supports extermination, segregation, and even enslavement.

English colonists are historically eulogized for seeking religious freedom, fleeing Old World persecution. A myth, unjustified, spread, portraying colonists as tolerant and peace-loving because they had known persecution; this fable was long part of the American myth. The English Protestants settling the northern colonies were initially friendly to the Indians, considered childlike and heathen. The colonists wanted the land, gold, and silver abundant in the New World; after all, England was a small island controlled by a hereditary nobility that valued the ownership of land. And the mercantilist period brought a sense of appreciation to the colonists for precious metals, a symbol of economic wellbeing and political power. Welcomed by Indians in a wilderness where land was plentiful, colonial hostility was unnecessary.

As the life-style of Indians began to conflict with that of the Protestant colonists interested in land and personal wealth, the heathens were made expendable, and the childlike image was changed to that of savagery. It was a simple matter to shift from a heathen to a savage description; by definition Protestants tuned to a successful God couldn't be heathens or savages. Of greater importance was the land communally controlled by many Indian tribes, a way of life and form of holding land foreign to the English system of individual title holding. To assure colonists following the Protestant ethic their rightful due, land loosely controlled by Indians must be acquired and controlled. Legal title in the individual was endorsement from Above, preferable to the Indian communal system. The method of operation adopted by the colonists differed slightly from that later practiced by the founder of the Standard Oil Company, who would buy up competitors or ruthlessly force them out of business.

The importance of land ownership to English settlers cannot be overemphasized. Where land is held in common, the status of the individual is not enhanced, a system which smacks of invidious royal control and the absence of individual rights. As a symbol of blessing from Above and to assure freedom and democracy, abstract and tangible values permitting the passage of title to progeny, the Indian system—a rough sharing of the wealth concept—was ill-suited to colonists seeking economic success. Pushed to defend their way of life, Indians were provoked by white settlers, who then invoked the Protestant God to justify greed, slaughter, and inhumanity. Man always places God on his side; religious support is frequently pointed to when wealth is sought. While not labeled a holy war, the European God apparently sided with settlers and not Indians.

After the massacre at Chesapeake Bay in 1622, signifying Indian savagery and treachery to the colonists, the English settlers were handed an excuse to wage war, an excuse probably long sought. From 1622 until recently, the white quest for economic success was not only endorsed from Above, but by economists and jurists accepting uncontestable economic goals, if not the means.

In fairness to Luther and other Protestant leaders, neither greed, foul play, nor economic acquisition was extolled; to pluck a few concepts from a mass of theology while ignoring the total is unfair. But Luther, contrary to Judaism and Catholicism, preached religious laissez faire, a formidable barrier if racial discrimination in the marketplace were to end, especially when coupled with classical economic theory. Calvin even saw material success as a blessing from Above not to be questioned by others. Whether viewed, as by Luther, that religion should not regulate business practices, or, as by Calvin, that economic success signified God's blessing, the implications were clear. Economic success for the white Christian was preordained, following a way of life infinitely superior to that of the heathen who was relegated, at best, to a secondary role.

This theology and hands-off approach became more significant when blacks were brought in large numbers to the southern plantations. With religious and economic theorists calling for neutrality, ignoring or minimizing exploitation, discrimination was inevitable. While noteworthy achievements can be pointed to as evidence of the success of religious and governmental neutrality toward business, the absence of moral concern and the inevitable brutality pointed to the need to reconsider doctrinaire positions. First, a hands-off religious policy may not be neutrality—it may be a sign of favoritism for the more powerful and signify racial and religious inhumanity. Neutrality can even signify that the more powerful cannot be controlled, necessitating their cultivation by church leaders.

During the nineteenth and twentieth centuries, many religious leaders evidently lost the right to claim moral leadership. While many *religiosos* and lay members today long to reestablish leadership roles in society, this is not a likely occurrence. In fact, the Supreme Court in the past 30 years may have supplied greater moral guidance than organized religion; the numerous civil rights decisions support such a conclusion. The Constitution is interspersed with philosophy and moral values often associated with religion, and the Supreme Court from necessity exercises considerable influence. Justices on the Supreme Court are sheltered from the pressures faced by religious leaders economically dependent upon the goodwill of parishioners. Every church representative seeks success, measured by the number of followers, buildings, programs, etc., success easily thwarted by influential lay members and church officials. The Supreme Court, consequently, may be in a better position to provide moral leadership than the ministry.

It is interesting to speculate whether Luther and Calvin would have reacted in the same manner as the colonists toward Indians and blacks. If intolerance to one race or religion signifies intolerance toward others, Luther would not have lost sleep over the mistreatment of Indians or blacks. Luther was anti-Semitic and held the Turk in low esteem, indicating that Indians or blacks would have been given the same treatment. Calvin, appreciative of life-styles foreign to Indians and blacks, could ignore the brutality of white Christians, a position of neutrality.

Protestant theology and interpretation are not easily reconciled with the principles movingly expressed in the Constitution. That the morality expressed in the Constitution has not always been followed seems obvious today. Because of biased theology, religiously immersed judges will interpret the Constitution less rather than more idealistically, protected by the thought that moral leaders shared similar views. Take the provision in the Declaration of Independence that "all men are created equal," an absolute position that does not permit exception. By interpreting this concept similar to Justice Black's absolute interpretation of free speech guaranteed in the First Amendment, neither hostility nor differences in racial or religious treatment is tolerable. It seems that "all men are created equal" requires full legal acceptance and protection for all species of mankind (and womankind).

Such a view is, of course, easy to quarrel with. Even freedom of speech may sometimes be denied. That all men and all women cannot be precisely equal at all times is also true. But at the very least the forceful position expressed in the Constitution could mean that blatant racial and religious hostility are unacceptable. But "all men are created equal" is followed by the clause "endowed by their Creator with certain inalienable rights." Was this clause intended to reduce the call for total equality? "(E)ndowed by their Creator with certain inalienable rights" reduces the democratic concept that "all men are created equal." European religion was woven into the firm constitutional commitment to equality, religion that never recognized the equality of other religions or mankind, at best calling for tolerance rather than equality. If "all men are" truly "equal," the Europeans would have been obliged to show more respect for Indians and blacks. That the "Creator" only gave "certain inalienable rights" supports an interpretation of the Constitution which permits equality for those sharing the same ancestry and Protestant religions.

A *gestalt* look at the Declaration of Independence and the circumstances surrounding its conception establishes the colonial desire to protect freedom of expression and to assure democratic representation. The bold sweep of "all men," interpreted in this light, does not include Indians and blacks not seeking representation or interested in the European form of freedom. Such a view, together with the religious background of the colonists, more accurately reflects the intentions of the drafters than a call for total equality.

In actual practice, "all men are created equal" is a myth requiring little amplification. Because of the economic, physiological, and sociological advantages accruing upon birth, absolute equality is impossible. Rather, it is a worthy goal aiding colonists enduring considerable hardship while hoping for a better life, especially for children. In this sense, the framers of the Declaration of Independence and Constitution opted for an open and democratic society, knowing that absolute equality for all is unattainable.

In any political system or private association, a degree of equality cannot be realized without political and economic power, essential to assure fair representation and opportunity. In any public or private organization, underrepresentation or a lack of representation means, if nothing else, that views are not expressed or adequately considered. Neither Indians nor blacks shaped Protestant theology or political thinking in the United States; that the Declaration of Independence and Constitution burst with expressions of freedom, equality, and fair play is coincidental without the input of minorities. That these documents are more humanitarian than the religion of its framers is not enough to guarantee political and economic equality.

Protestant thought, exported to the colonies, could not reflect the lifestyles of Indians, blacks, or Orientals. Each religion exudes a superiority and confidence based on past and localized experiences that are formalized and later twisted, if necessary, to fit changing needs. This twisting is demonstrable in the interpretation of the Constitution, if viewed as a religious form. Without the input of all to be governed, whatever race, color, or background, "all men" cannot be "created equal" or "endowed by their Creator with" the same "inalienable rights." This position will be more fully documented when discrimination against women and homosexuals is later explored.

Judaism influenced Catholic doctrine, which in turn influenced Protestant doctrine. While bloody battles were fought in the names of these religions and nations, philosophers shaping theological thought shared a common heritage and similarity of economic thought. Some degree of toleration, imperfect though it may be, is inevitable among white Jews, Catholics, and Protestants. While these religions pointed to the shortcomings of each other, in the United States accommodation resulted because of economic opportunity not available in Europe. To this extent, America is a melting pot, a land of opportunity. But the Indian, black, and Oriental were complete strangers, sharing little in common with European settlers. Those practicing religions unknown to the Europeans are more easily brutalized, justified by familiar theological doctrine.

The Indian, black, and Oriental, easily identified, could not melt into the white community. The Jew and Catholic facing discrimination could more easily fade into his surroundings if not actively seeking complete equality. But those easily identified holding land and the door to other economic opportunities could not be ignored by the European.

As the world demand for cotton multiplied during the nineteenth century, the shortage of labor led to slavery, and religious toleration or approval was essential to mute criticism. A nation influenced by European settlers naturally draws religious leaders and the legal system into economics and politics. That blacks held in slavery did not benefit from the political concept that "all men are created equal" was evident, willed by God or excluded from the range of *homo sapiens*. Luther firmly held the view that Protestant theologians should not criticize or support the business community, a position of neutrality associated with English and American jurisprudence. Those favored by wealth were not to be criticized.

The maintenance of neutrality, whether it be religious or legal, is a worthy goal, but to cling to the position that it is achieved by noninvolvement in the marketplace may be nonsense. When wrongdoing occurs, whether private or public, the weak are without a remedy (unless reward in the hereafter is sufficient), and the powerful continue without criticism. By the end of the nineteenth century, the promise that the meek would inherit the earth and that the underprivileged would be rewarded in the hereafter was not enough to compensate for misery on earth. As a matter of fact, Protestant theologians were involved in business, advising the poor to accept the hand dealt by God. Advising the acceptance of earthly conditions is not neutrality while businessmen are theologically free of responsibility. Protestantism lends considerable support to the powerful, even conceding that the Lord moves in mysterious ways. While it cannot be established that religious or political intervention is always helpful, turning away from inequity will not make problems disappear or temper the economically powerful.

Explanations, several of them economic, support the Protestant call for marketplace neutrality. With a limited amount of worldly wealth, division would not eliminate poverty. The promise of reward in the hereafter is economically sound, possibly preventing bloodshed. But the fact that a subsistence level of income for most was realistic does not explain the religious support in the South for slavery. Equating the subsistence level of income for free men with the subsistence provided for the slave evades the basic principle of freedom. But another economic explanation is possible, much like that advanced by Charles A. Beard in *An Economic Interpretation of the Constitution of the United States*. Religious organizations require financial support, and donations are essential, especially from the wealthy, for buildings, salaries, charity, missionaries, education, social programs, etc.; contributions from the poor are insufficient to carry on the Lord's work. The goodwill of large donators is essential to church success, leading to a mode of operation that benefits the church and placates large contributors. Let the successful operate without criticism and their support is assured, an approach later polished by classical economic theorists and jurists. In the South, a few were wealthy while the bulk were poor or in slavery; Episcopalian, Methodist, and Baptist sects could not succeed and grow without large contributors.

Success in the ministry is often measured by earthly accomplishments, the number of parishioners (particularly if economically successful), buildings, programs, etc. For ministers to question doctrine supporting slave-holding could lead to organizational bankruptcy. Episcopalians did not seek black converts because of the theological premise that Christians should not hold other Christians in slavery. As long as the blacks remained heathens, or even Muslims, the Episcopalian ministry could ignore slavery, "neutrality" essential to retain membership largely drawn from the middle and upper economic classes. The Methodists and Baptists soliciting black membership were interested in numbers and easing their life on earth. Explaining the tortured religion practiced before and after the Civil War has at least some economic base and awaits full treatment by a Beard. Few Catholics and Jews could be found in the South before the Civil War; those in the South were city dwellers and not plantation owners. But it is doubtful whether the farm economy that dominated the South would have been considerably different irrespective of the dominance of other religions.

The southern ministry, backing plantation owners and others fearful of freeing blacks, advanced the following reasons to support slavery:

1. Blacks, irresponsible and unable to care for themselves, were better off in slavery. Black slaves were better off than poor whites laboring, when work was available, for subsistence wages. Blacks, representing an investment, would be better treated than free whites easily replaced without cost.
2. To enlighten and bring God's word to blacks.
3. Genesis 9:25, the curse placed upon Ham and his descendants by Noah.
4. Slavery was a political and not a legal issue. Because of the English experience with religion, the ministry in the United States would be sensitive to the possibility of political manipulation.

That the ministry fully accepted these explanations before the Civil War is difficult to believe in this day and age; holes can be punched in the rationale advanced to support slavery. Does black irresponsibility or unacceptance of the Christian God and life-style justify slavery? In fact, many blacks were dependable and skilled when given the opportunity. Is slavery any less a political issue than church property and freedom from taxation? While black slaves may have been as well-off as poor white workers, particularly in the South, is the holding of one human being by another, against his will, justified? Southern clergy it seems were soiling their hands in the business world by supporting slavery in spite of the Protestant call for noninvolvement.

This brief synopsis is important to an understanding of legal and political developments, if they are separable, before and after the Civil War. Morality is supposedly ingrained in law and politics and if the Lord's servants, the moral pacesetters, support or ignore inequity, judges and politicians are no less righteous and not to be condemned. While current public policy is emphasized, some understanding of the past is essential to explain the difficulties faced today. Incorporated into the civil law and common law systems in every country are church doctrine and concepts of morality.

Chapter III

THE IMPLICATIONS OF ECONOMIC THEORY

Introduction

The Civil War and the subsequent adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments are pointed to as evidence of a national belief in freedom and fair play, guarantees trumpeted far and wide as proof that equality and opportunity were open to all residents. While there may be some truth tc the claim that the United States was less hostile to foreigners than other nations, opportunity was not always available to all. Those immigrating from the European nations, white, shared to some degree a common religious and cultural heritage which probably prevented blatant discrimination. The Jew, Catholic, and Protestant, despite deep-rooted differences, shared a common history and religion, springing from the same tree. But the black, Indian, Oriental, and others were not out of the same mold and did not share the European's religious values and economic goals.

The majority of the white people in the United States probably abhorred slavery, or at least were guilt ridden, but few believed in social and economic equality. If equality is not a widely accepted goal, those who are "different" can anticipate considerable political and economic hostility. The needs of blacks and others were never realistically evaluated by economic theorists and post-Civil War leaders, while propagandists, including educators, spread the myth of racial equality and harmony. Before problems can be dealt with, theoretically and realistically, they must be acknowledged. Leaders, economic, religious, and political, seldom admitted that racial discrimination permeated every corner of the United States. The economic and constitutional theory dominant in the United States until the 1930 depression will now be examined in light of prevailing social attitudes.

Economic Theory

Adam Smith in 1776 published his libertarian masterpiece, *The Wealth of Nations*, critical of the inefficient economic system in England, injurious to national and world trade. Departing from Judaic and Catholic concepts of the proper church role, Smith, to promote the public good, advocated the selfish promotion of economic interests and state neutrality in the marketplace, a 360 degree departure from the mercantilist system. In actual practice, neither the classical economic theory advocated by Smith nor the mercantilism practiced in England matched the life-styles of African blacks, American Indians, and the early Greek philosophers. Like blacks in Africa and Indians in America, Greek philosophers did not worship material wealth, which did not lead to happiness, and was not considered a sign of personal worth. The economics of the Greek philosophers were similar to the Judaic and Catholic scholastics, that fair play in trade requires constant supervision.

The early scholastics addressed themselves to such market problems as just wages, monopoly, usury, etc., partly in recognition that human beings were imperfect. Judaic and Catholic thinkers did not advocate a classless society, but one in which, according to station in life, each was assured a just share; to seek more was avarice, an affront to God. Religious influence is reflected in the early guild system where apprentices, journeymen, and masters were entitled to a fair share of the value of the goods produced. In summation, the church position was that prices and wages were a social concern, to be regulated. While scholastics did not discuss competition and its advantages, it could be implied in the omnibus concept of regulating market conditions.

Adhering to the scholastic theory of just prices for goods and wages was difficult. For example, if luxury goods are sold, should there be concern with the just sales price? Crop failures made it difficult to place a just value on produce, demand being inelastic. The bubonic and other plagues and wars reduced the working population to such an extent that fixing the just wage was difficult. Yet, the need for food and fair wages demanded church or state regulation to protect most people born poor and destined to die poor.

The scholastics condemned monopoly, monopsony, and oligopoly, conditions offensive to life, liberty, and happiness, guarantees later appearing in the Constitution. In many ways, the constitutional guarantees smack of great public concern with moral values expressed in religions and by natural law advocates. From the sixteenth to the end of the eighteenth century, the height of mercantilism in England, geographic and trade monopolies were encouraged by the Crown. European political leaders rightfully deduced that economic and political power were inseparable, and that the accumulation of wealth, particularly precious metals, was essential, assuring worldwide domination. To assure a favorable trade balance and support for the English crown, monopolies were governmentally licensed. Mercantilism was promoted as a natural extension of the centralized executive, legislative, and judicial powers residing in the king, particularly after Henry VIII quarreled with religious leaders refusing to annul his marriages. Unable to depart from Matthew, "What God has put together [marriage], let no man put asunder," church influence over prices and wages faded in England.

Following Aristotle and the natural law, theologians during the Middle Ages justified economic inequalities and slavery. But the more liberal thinking of the Middle Ages conflicted with church doctrine established in the past. Natural law proponents during the sixteenth century fought church regulation of wages and prices, reasoning that the pursuit of economic wealth free of regulation would be socially beneficial, an extension of natural law theory. Natural law theory also conflicted with mercantilist doctrine requiring regulation of the marketplace. Many critics abhorred granting monopolies to favorites of the Crown, thereby restricting the natural rights of others. Advocates of unregulated trade reasoned that the quest for profit stimulated the best in men without considering, realistically, that the worst was also stimulated. The natural law exponents infrequently, if at all, addressed themselves to how much property or the kinds of property that should be acquired. Religious leaders saw mankind more realistically, recognizing the capacity to engage in wrongdoing and the need to check profiteering. Natural law thinkers preceded the laissez faire economics of Smith, but Smith and others were the civil libertarians of their day, critical of the abuses of government power and inefficiency of monopoly. Self-interest would spur individual initiative, thereby benefiting society, while limiting political authority. Could free market play lead to excesses as damaging and as ruthless as political control?

The emergence of Erasmus and Luther, leaders of the Reformation and Protestantism, led to the demise of the religious control of prices and wages and, eventually, mercantilism in England. Some English proponents of freedom in the marketplace were clergymen resenting public interference with religious authority. The eighteenth- and nineteenth-century white residents of the United States eulogized the economics of Adam Smith, influenced by Protestantism and natural law enthusiasts. While mercantilism could be reformed to accommodate social needs, corruption and inefficiency dictated a clean sweep, calling for a new brand of economics spreading opportunity and limiting political power. Smith was an eighteenth-century liberal interested in raising per capita income on earth without promising reward in the hereafter. Luther, departing from Judaism and Catholicism, promoted an economic theology following the natural law enthusiasts. He felt that religion should not sink to policing the marketplace and fixing prices, a matter of earthly concern, but should concentrate on spiritual and more important heavenly matters. In many ways, Luther's thinking was Aristotelian. Not that Luther supported avarice and greed—he simply felt that churchmen had better things to do for which they were trained.

Using labor efficiently and with rapid technological innovation, Smith promised that the poor would benefit. Smith did not support division of labor as a means of creating a robot work force, but to stimulate worker interest and substitute technology for drudgery. Slave labor chilled incentive, self-improvement, and thinking, according to Smith. The threat of punishment and not reward drove slaves. Only freemen were inventive. But increased production and specialization were the key to increased per capita income and personal happiness.

Malthus, ecclesiastically trained, was pessimistic about the long-run ability of people to attain a decent standard of living as long as population increased geometrically and the food supply increased arithmetically. Malthusian thought drives the poor, who are rewarded in the hereafter, to seek solace in religion, in line with Protestant doctine. Smith, more optimistically, supports Protestantism by maintaining that buyers and sellers would not operate at a long-run disadvantage; absent government interference, neither public nor religious emissaries would be needed to supervise the marketplace to assure fair play for all. While problems would arise, all thrifty, competitive, hard-working citizens would benefit absent government interference. The classical theory proposed by Smith and others was welcomed in the United States, the colonists having experienced taxation without representation and repressive English regulation. The United States Constitution contains the seeds of classical economics—the separation of executive, legislative, and judicial power and the limitations placed upon federal power. The constitutional diffusion of political power was meaningful to industrialists; it is unrealistic to separate political from economic power. Gross industrial wrongdoing cannot be checked within a locality and the need for economic promotion theoretically outstrips the government interest in protecting individuals who will ultimately benefit. Smith felt that some government intervention in the marketplace might prove necessary to aid individuals, a fact easily overlooked by theorists and the power brokers.

The colonists and settlers before the Industrial Revolution saw the ownership of land as symbolic of social status and economic well-being. The English nobility were large landowners, and agriculture, until the beginning of the twentieth century, was the major industry. While mercantilist interest in metals also conditioned the response of settlers, the dominant driving force was land. This devotion to land ownership undoubtedly influenced attitudes and ultimate policy toward the Indians, whose thinking was shaped by the communal holding of land. Supported by religious leaders labeling the Indian a heathen, savage, and child, injustices were easily explained. Greed, a sin, was in fact the dominant force shaping attitudes and public policy. Even the economics of Smith backed settlers concerned with sufficient food and minimal government interference. If individual settlers owned land poverty, as known in England, could be eliminated. Provide the incentive to succeed, and most people would benefit.

There is some evidence that the English proponents of mercantilism undervalued agriculture and overemphasized the importance of industry and extrinsic market values. To assure an orderly and efficient growth of industry, farmers must be able to provide food for those removed from the soil. Mercantilists recognized the value of labor, a value recognized in religion, but the church regulation of wage and a static concept of social position were unnecessary for the laissez faire economic theorists.

Smith lived during an era of small craftsmen, although a few large trading companies were licensed by the Crown. The jurist interpreting the United States Constitution during the nineteenth century seemed oblivious when fixing social policy to the fact that Smith was a humanitarian addressing himself to evils in the English industrial system, stressing the value of human labor while conceptually placing responsibility for the value of the final product in the hands of buyers and sellers. Many of the jurists responsible for shaping nineteenth century constitutional theory accepted the economists' recognition of the need to compensate the landholder and supplier of money, but ignored the exploitation of labor. These jurists were also influenced by Protestant theology, which helped to shape constitutional interpretation.

Wages, according to Smith, were dependent upon the supply and demand for labor, a theory later enhanced by Malthus and the wages fund theory popularized by John Stuart Mill. Smith conceptualized the function of government as protecting citizens from foreign political aggressors, and not economic competitors; preventing the oppression of individuals other than in the marketplace; and providing essential public services like schools, streets, harbors, etc. To protect citizens from warlike nations and to provide essential public services, government was to take an active role. But the role of the government, as visualized by Smith, is less clear if asked to protect the individual; more than the prevention of crime and protection of person and property might be necessary, if the government role is broadly interpreted, and it may be essential to protect individuals ruthlessly exploited in the marketplace. Needless to say, differences of opinion arise as to when government interference is called for. The nineteenth- and early twentieth-century jurists chose to support market freedom towards corporations while strongly protecting property holders, endorsement of the Calvinist view of not questioning God who bestows wealth upon the privileged few.

The wage fund theory proponents implicitly endorsed the prevailing Protestant ethic of the day and Malthusian thought. These theorists held that a fixed sum of money was available at any given period of time to pay labor. As population increased, workers shared in the total sum set aside for wages, reducing the income of each worker. Classical economists recognized the tendency for population to increase as economic conditions improved, preventing workers from reaching a decent standard of living, the total wages available increasing less rapidly than the supply of labor and more efficient technology. While family size could be limited to assure larger shares of the mythical fund, a long run possibility, limited knowledge of birth control techniques and religious beliefs prevented significant improvement. Mill conceded that during a depression, or under other circumstances, the total wages fund could exceed the wages paid, conducive to employer saving and investment. For example, the total wage bill would be less than the total wage fund if there should be a shortage of labor. Mill and other proponents of the wage fund theory acknowledge the possible push to grind wages down to the barest minimum without fear of religious or government condemnation.

Admittedly a limited explanation of the economic theory developed in England, commentary restricted to the American scene is now in order. Many influential economists to the end of World War II were English, mainly describing and refining concepts geared to local conditions. Say and Walras, French economists of note, refined and commented upon theory emanating from England. Unfortunately, the influential political and judicial forces in the United States accepted, with infrequent question, English economic theory that did not accurately reflect local conditions. Unlike England, land in the United States was plentiful with labor in short supply. Slaves in England were too few, used as servants rather than for the production of goods, to influence wages, supply, demand, etc., necessary ingredients in classical theory to assure fair play in the market. With 4,000,000 slaves in the southern states at the time of the Civil War, cotton and a few other crops dominating and shaping the political economy, laissez faire and Protestant neutrality were politically and economically disastrous for blacks.

Black slaves could not influence the marketplace, being neither sellers nor buyers of goods. Nor could black slaves market their labor, working in the fields under the threat of punishment. While inefficient in England, according to Smith, there being an ample supply of free white labor, slavery was an efficient if not the only substitute in the South, particularly after the invention of the cotton gin and the increased worldwide demand for cotton clothing. By either raising slaves for sale or as plantation operators, slavery was profitable in the United States. Small-scale farming was not profitable in the South, and atomistic competition was preventable with large-scale farming (even if free labor was used). Large-scale farming contains the seeds of monopoly and oligopoly, although, concededly, many operators participated. By organizing into associations or controlling the political system, plantation owners could control supply and price.

After the Civil War, the absence of industrial opportunity and the devastation of the plantation system indicated that Smithian principles could not, realistically, apply in the South. Approximately 90 percent of the blacks lived in the rural South at the end of the Civil War, most unable to read or write. Most black people were unskilled, not instilled with the Christian-Judaic will to succeed economically. Society, permitting the free marketplace, legalized slavery until the Civil War, but would not, following Smithian capitalism, intervene afterwards to assure equal education or industrial opportunity. Laissez faire remained the cornerstone of political and judicial philosophy, unfair to the blacks obviously needing government support. Young industry was protected by tariff, acceptable even to economists favoring free international trade; yet, the same type of protection was not advocated for the new freemen obviously at an economic disadvantage.

Without capital or land, how could the black succeed, especially since fertile land in the western territories was held for white settlers? Without education and industrial experience, how could blacks possess the perfect knowledge of buyers and sellers presumed by classical economists? If considered inferior, white attitudes would not be changed by a war. By failing to realistically assess black conditions and white racial attitudes, the state and federal governments supported the dominant white. Laissez faire and neutrality are shallow concepts if the cards are stacked, blacks realistically not able to make economic or political headway. Given these conditions, racial hatred in the South and West increased significantly to the point where government intervention was necessary to protect blacks. With a huge supply of unskilled labor, advocates of freedom in the marketplace were not playing fair. While Smith correctly pointed to abuses perpetrated by the English Crown, a moratorium on following free market play doctrine was necessary in the United States after the Civil War. But politicians and jurists, as developed in the next section, were unable to extricate themselves from the religious influences and classical economics developed in a foreign environment.

Chapter IV

CONSTITUTIONAL INTERPRETATION

Before 1930

Racial and religious discrimination were inherent in the United States Constitution after the nation was formed. Southern political leaders, securing concessions from northern politicians bowing to pressures to assure amalgamation, locked into the Constitution economic and political protection for the southern states. While guaranteeing the fundamental protection of human rights for white Protestants, the Constitution is also a document designed to protect large landholders and other selfish interests. Article I, Section 9 not only authorized the continued importation of slaves for 20 years, essential to increase the labor supply in the South, but also legitimized slavery. By temporarily permitting the importation of slaves from Africa, reproduction and some care would assure an adequate labor supply in the future. The political concept of state rights, long a thorn to equal rights, is inherent in Article I, Section 9. Yet, Article IV, Section 2, granting owners the right to follow slaves harbored in a state outlawing slavery, interfered with the right of each state to grant asylum to fleeing slaves. Both Article I, Section 9, and Article IV, Section 2, accept the white ownership of slaves, treating them as personal property appended to real property.

Foreign to the concept of freedom and democratic representation was Article I, Section 2, permitting the counting of slaves as three-fifths of a person for purposes of representation in the House of Representatives. To consider him property under Article I, Section 9, and Article IV, Section 2, while counting the black as three-fifths of a person for political representation, is evidence of the concessions necessary, however inconsistent, to form this nation. Article I, Section 2, is also evidence that the black slave was not an equal of the white, either in the North or South.

To ignore this historical background is not realistic when viewing the criticism levied at the Supreme Court for failing to follow the straight path leading to "all men are equal." Given the constitutional acceptance of slavery and other inequities, it was perfectly logical for the Supreme Court to permit the continuation of inequality. In the *Dred Scott*[1] decision of 1857, the Supreme Court endorsed the right of a master to follow and recapture a slave fleeing to a territory. The religious and constitutional discrimination that saturate the entire history of the United States is mirrored in the *Dred Scott* decision. According to the Supreme Court, blacks

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[1] Scott v. Sandford, 60 U.S. 393.

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Starting with the curse placed upon Ham and his ancestors, religion regarded the black as unworthy, not a fitting associate. Some religious leaders justified slavery as a means of indoctrinating the black with Christianity. That the black was unfit to associate with the white is inherent in Episcopalian doctrine, evidenced by the reluctance to convert blacks, and the segregation of blacks in Methodist and Baptist churches after slavery ended. The same bias, whether religious or political, is found in Article I, Sections 2 and 9, and Article IV, Section 2. If segregation in schools (constitutionally prohibited only since 1954) smacks of inequality, then doctrinaire religious discrimination and segregation in churches also spell inequality. If religion brands blacks less worthy than whites, economic opportunists, political leaders, and jurists cannot be faulted for following the moral pacesetters. If the Supreme Court found the blacks "so far inferior that they had no rights which the white man was bound to respect," religions, even those seeking black converts, were equally biased. If religious leaders justified slavery, the black could "lawfully be reduced to slavery for his benefit."

The lack of employment opportunities for blacks cannot be fully appreciated without some consideration of history. While the Civil War was fought to end slavery abhorrent to many religious, political, and legal leaders, it is naive to assume that equality was sought in the United States, North or South; there was little support in the white community for black equality. Witness the black codes enacted by the southern states after the Civil War to keep blacks in a perpetual state of servitude and the reluctance of the federal government to provide meaningful education and industrial training. While the Thirteenth, Fourteenth, and Fifteenth Amendments were aimed at the southern states, judicial interpretation reinforced the view that equality was not intended. With approximately 90 percent uneducated and most short on marketable skills, blacks could not achieve economic equality.

The Thirteenth, Fourteenth, and Fifteenth Amendments were directed at private hostility and blatant state discrimination, necessary to authorize congressional action and limit the state prerogative. The Tenth Amendment clearly specifies that federal power must be enumerated, the states holding residuary power. Presumably, the Fifth Amendment, which protects individuals from abuse by the federal government, is broad enough to guarantee the same protection spelled out in greater detail in the Fourteenth

Amendment. The Fifth Amendment states the "(n)o person shall . . . be deprived of life, liberty, or property, without due process of law," natural law philosophy and a worthy goal. The Thirteenth Amendment prohibits "slavery" and "involuntary servitude"; the effect of white people treating blacks as little more than a chattel was not specifically prohibited. The Fourteenth Amendment, with a considerably greater reach than the Thirteenth Amendment, specifies that "(n)o State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Of particular significance to blacks were the so-called due process and equal protection clauses.

In the *Civil Rights Cases,*[2] private businessmen refused to serve black customers. The Supreme Court ruled that economic discrimination in the private sector was not the equivalent of "slavery" as forbidden in the Thirteenth Amendment, while the Fourteenth Amendment only prohibited discrimination by state agencies. By following the theological and classical economic concepts of marketplace neutrality, the Supreme Court, adopting a strict constructionist interpretation, did not utilize the Constitution to aid blacks facing private discrimination. If entrepreneurs discriminated against black customers, perhaps foregoing profit, it was a foregone conclusion that blacks seeking employment would fare no better. As stated by the Supreme Court in *Dred Scott,* and refined in the *Civil Rights Cases,* blacks should not expect coddling or fair play from industry.

There are many constitutional aspects of the *Civil Rights Cases* worthy of comment, but the employment implications for blacks are particularly noteworthy. The position clearly taken by the Supreme Court was that "slavery" and "involuntary servitude," as noted in the Thirteenth Amendment, and the prohibition against state discriminatory action contained in the Fourteenth Amendment, were to be strictly interpreted. The nineteenth-century Supreme Court clearly reflected the will of society, unwilling to tolerate slave ownership or promote equality of opportunity. This strict constructionist interpretation of the Thirteenth and Fourteenth Amendments can also be labeled judicial neutrality, a laissez faire constitutional attitude. By not admonishing employers or "coddling" blacks, the judicial branch of government escaped marketplace involvement.

By restricting court involvement, was the Supreme Court in fact neutral? If employers are white, economically and politically potent, and unwilling to play fair industrially, the Supreme Court assured private discriminators that they need not fear the judiciary. If judicial neutrality is a meaningful concept, adversaries must be equally capable of protecting their well-being; otherwise, neutrality benefits the more powerful. If whites control all the "marbles," blacks cannot make headway in industry. The concept of judicial neutrality is often shallow and unrealistic—witness the *Civil Rights Cases*.

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[2] 109 U.S. 3 (1883).

Another aspect of the *Civil Rights Cases* was the reluctance of the Supreme Court to chip away at state control of private discrimination. The *Civil Rights Cases* certainly satisfied the advocates of states' rights, limiting federal involvement. To prevent the centralization of political power, advocates of minimal federal power ignored discrimination that continues while state officials turn away. State executive and legislative officials are no more neutral than jurists if they willingly ignore wrongdoing. If state officials would not stop the Ku Klux Klan and lynching, an inescapable conclusion, inaction is the equivalent of state action; similar rationale can be advanced with regard to employment in the private sector. The political liberalism of the nineteenth century toward business and its need for freedom to expand, a mark of efficiency, conflicts with the political liberalism espoused after World War II. The Supreme Court, tuned to nineteenth-century liberalism, ignored black needs in the *Civil Rights Cases*. The Supreme Court after 1945 shifted emphasis, showing greater concern for the common folk.

The Supreme Court's concern for business freedom and states' rights continued until the 1930 depression, preventing judicial changes essential to fair play. However, due to the depression and World War II, economic and judicial attitudes changed, leading to the reexamination of the *Civil Rights Cases* theory and implications. Keynes supported an economic theory that radically departed from classical economic theory, advocating government involvement in the marketplace to stimulate demand and investment. To stimulate short-run demand and investment, the public must be convinced that prices and wages will not continue to drop; if further price drops are anticipated, consumption and investment are postponed, further aggravating unemployment. The government should create jobs for the unemployed by projects beneficial to society, thereby pumping money into the hands of "fast spenders." As people return to work and spend their earnings, there is a "snowballing" or multiplier effect, leading to the employment of more people. To encourage investment, the federal government engages in meaningful monetary and fiscal manipulation, assuming responsibility for providing jobs. In the short run, the federal government should stabilize wages and prices (the classicists advocated wage and price reductions), gradually increasing both in the long run. When rock bottom is reached, consumers and investors are encouraged to spend, anticipating price increases in the future.

Keynes, unconcerned with states' rights, judicial neutrality, and racial discrimination, forced a new look at classical economic doctrine. It was obvious that the state was incapable, financially and politically, of providing meaningful marketplace direction and manipulation. Like it or not, only the federal government was capable of providing the necessary economic lift even though federal power expanded and state control diminished. States' rights, an abstract doctrine to many, meant little when jobs and other opportunities were at stake, a natural result given the past total commitment to economic well-being. In short, the economic welfare of citizens is more important than the preservation of state political power. If federal aid is sought, state control, however slight, is relinquished to the bearer of gifts. To meaningfully augment federal manipulation in the marketplace, jurists would be required to reconsider past limitations placed upon federal authority.

Sociologically, medically, and psychologically, the classical economic explanation of wages was questionable. Laborers, generally speaking, cannot negotiate for their services unless there is an extreme labor shortage. Rather, employers buy labor, fixing wages. A bubonic plague could wipe out a labor force, driving up wages. But plagues were controlled, at least in the United States, medically and pharmaceutically. An earthquake or storm not only decimated the population, but also wiped out jobs, jobs that could not be recreated without future federal help. Also, the devastation wrought by earthquakes and storms could be minimized with scientific help often provided by the federal government. It seems fair to conclude that workmen accepted and remained in jobs without thought of selling their services to the highest bidder, little information being available of opportunity, geographic and occupational immobility, and the manner in which labor was recruited (many employers secure help informally, i.e., by white employees telling friends about job openings).

Economists ignored racial discrimination, claiming that employers interested in maximizing profit were color blind, interested in the most efficient workmen. That employers reflected the religious and social mores of the dominant forces in the United States was conveniently ignored. That employers would consciously practice discrimination to profit, ostensibly protecting morale in the plant and productivity, was also ignored by economists. While employers forcefully kept employees from joining unions without thought of employee morale, economists remained concerned with productivity in the abstract. Realistically, white employees are in no position to display distaste for fair employment, knowing that employers control the plant. Psychologically and sociologically, it can be argued that productivity can be spurred, rather than reduced, if employees are threatened by integration.

Some economists even today reason that government should not outlaw employment discrimination, because those facing hostility are forced to improve more than others, designating the Jew as an example. But immigrant Jews came to this country with middle class values and a wholesome respect for education. In addition, by ignoring religion and "melting" into Christian society, Jews could be assimilated in big cities. For some, discrimination leads to excellence and the development of skills; the athlete may be a good example. But for others, perhaps the vast majority, discrimination is a negative influence, reducing or eliminating motivation; if peers and others do not succeed, why try? The black ghetto dramatically illustrates to the young that economic success is not attainable—neither education nor effort would be rewarded.

In *Plessy v. Ferguson*,[3] the Supreme Court ruled in 1896 that separate but equal opportunity did not violate the Fourteenth Amendment. Consequently, government-sponsored segregation in the classroom was not constitutionally banned. *Plessy* together with the *Civil Rights Cases* should have alerted American economists of the nineteenth and twentieth centuries that blacks were second class citizens or less. How can schooling be equal if economic success does not follow? Few appreciate education for the sake of learning—the opportunity provided to succeed economically and gain recognition spurs academic and vocational learning. The Supreme Court in *Plessy* theoretically counted bricks and equipment, the physical plant, and teacher degrees as satisfying the Fourteenth Amendment, without considering motivation and the negative impact of the *Civil Rights Cases* on blacks. Not until 1954 did the Supreme Court change its interpretation of the Fourteenth Amendment, finally accepting what was always obvious, that separate meant unequal and that racial hostility in the marketplace would continue to limit black motivation.[4]

The Fourteenth Amendment after 1930

Industrial on-the-job training can be calibrated with book learning. If schools can be segregated, industrial training and opportunity will be unequal unless government forcefully assumes a leadership role. For example, industrial training in high schools differs substantially when schools are segregated. Government investigations conducted during World War II pointed to the continuation of discrimination if traditional wage theory was followed. Economists failed to take note of the evidence gathered by other social scientists, dooming the hands-off philosophy taken by the classicists. Since World War II, classical economic theory has taken a back seat where racial discrimination is an issue.

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[3] 163 U.S. 537.

[4] Brown v. Bd. of Education, 347 U.S. 483.

States' rights advocates took another blow on the chin when the 1930 depression forced the Supreme Court to reconsider the previous limited interpretation of the interstate commerce clause. Per Article I, Section 8, the Constitution authorizes Congress to regulate commerce between states. Prior to 1935, labor was not equated with the movement or the eventual movement of goods. Consequently, labor could only be regulated by state and not the federal government, except for antitrust violations. In 1935, Congress passed the Wagner Act protecting the right of employees and job seekers to join unions and encouraging collective bargaining. Many employers ignored the Wagner Act, claiming it was unconstitutional because the federal government was attempting to regulate intrastate commerce. In a five-to-four decision, the Supreme Court ruled that employer-employee relations in the plant were properly regulated under the interstate commerce clause; the possible disruption of production could ultimately affect the shipment of goods.[5] The main factor, according to the Supreme Court, was not the stage of production or actual shipment of goods, but whether employers bought raw goods from without the state or shipped finished goods across state lines. If either condition was met, employers operated in interstate commerce and were properly regulated by Congress.

The states' rights approach taken in the *Civil Rights Cases* was dealt a heavy blow when the Supreme Court upheld the constitutionality of the Wagner Act. If the meaning of the interstate commerce clause is enlarged to permit the federal regulation of in-plant activities, state control of many aspects of employment may be limited, including racial discrimination, because of federal preemption. The Wagner Act, as subsequently modified by the Taft-Hartley Act, provided a forum whereby employers and unions engaging in discrimination, for or against union advocates, could be regulated and sat upon, when necessary. The National Labor Relations Board (NLRB), assigned two major tasks, to hear disputes involving union representation claims and unfair labor practice charges, inevitably faced questions of employer and union discrimination. If unions engaged in racial discrimination while negotiating with an employer, can there be fair representation or bargaining in good faith as required by the federal law? By relying upon the interstate commerce clause and federal legislation, racial discrimination, unreachable under the earlier and limited Supreme Court reading of the Fourteenth Amendment, could be reached in the private sector. The government neutrality called for in the *Civil Rights Cases* toward private industry was actually doomed with the expanded reach of the interstate commerce clause designated in *Jones & Laughlin Steel Co.*

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[5] NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937).

While much can be said in behalf of limiting federal power, states' rights advocates often ignore what is apparent, that the constitutional limitation on federal power was not intended to shield wrongdoers within a state, whether in the private or public sector. As corporations and unions became increasingly economically and politically powerful, the Supreme Court had to face the fact that judicial neutrality was not tolerable since racial discrimination was encouraged. Large employers and unions are closely allied with executive and legislative decision-makers, requiring courts to recognize the increasing difficulty of separating public from private action. The Sherman Act and its subsequent interpretation allowed the growth of corporate giants that dominated industries and the nation. The Railway Labor Act, Norris-La Guardia Act, and Wagner Act paved the way for the growth of unions who found it necessary to operate in the political sphere. The growth of union power was not only desirable as a means of promoting collective bargaining, an economic goal, but to equalize political power traditionally favoring industry and agriculture. While unions, like others, could abuse this new found political power, at least another force could operate effectively to represent workers. In this sense, the growth of union power as a countervailing political force was socially desirable. While powerful private interests manipulated federal and state politicians, decisons were made reflecting political reality rather than public need. Candidates seeking public office must share the philosophy of the power brokers before they could be endorsed and financially supported. The failure to reapportion political representation in Congress and state legislatures is evidence of the meshing of private and public interests.[6]

Given these conditions, judicial neutrality is less desirable in the political and economic areas. Urban dwellers and minorities congregated in cities at the end of World War II were not fairly represented in state legislatures and the House of Representatives.[7] The time was ripe to change basic judicial philosophy in the political and economic spheres.

Current Interpretation

A decision of considerable significance, heralding a shifting judicial philosophy, was *Shelley v. Kraemer.*[8] Committed to *stare decisis,* the Supreme Court reluctantly shifted gears to meet twentieth-century challenges. Without expressly reversing the *Civil Rights Cases,* the Supreme Court in *Shelley* adopted an approach that required rethinking of the meaning of state action. If state action is broadly rather than narrowly conceived, the

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[6] Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

[7] Colegrove v. Green, 328 U.S. 549 (1946).

[8] 334 U.S. 1 (1948).

Fifth and Fourteenth Amendments could reach racial discrimination in private employment. For this reason, *Shelley*, while not involving employment, constituted a significant breakthrough for the black community.

In *Shelley*, a racially restrictive covenant was recorded in which home owners agreed not to sell their properties to black buyers. One of the signatories, contrary to the agreement, sold his property to a black, and the other owners sought an injunction in a state court to stop the sale. To legally permit the sale, the defendant contended that the restrictive covenant violated the Fourteenth Amendment, denied by the plaintiffs contending that they were private citizens and not public officials. The Supreme Court noted that Congress as early as 1866 passed a law granting to blacks the right to buy and sell real and personal property and that the Fourteenth Amendment was violated when private persons sought state aid to enforce a discriminatory agreement. The fact that private parties negotiated the agreement, which was declared legal, was deemed inconsequential since enforcement of the agreement, by issuing an injunction, constituted forbidden state action.

Shelley told the lower courts that the limitation announced in the *Civil Rights Cases* was clipped substantially and that it was proper to search for state involvement in the private sector. The Supreme Court decision in *Shelley* was strange on two counts—the restrictive covenant was considered legal as long as the signatories adhered to the agreement without involving the courts, and no mention was made of the recording of the agreement in the county recorder's office, a public agency. To lay people and lawyers, a legal agreement signifies the right to seek enforcement if necessary; calling an agreement legal under the Fourteenth Amendment while prohibiting court enforcement is a tortured judicial line to take. To some, *Shelley* changes the clear meaning of the Fourteenth Amendment, and shows a lack of judicial restraint, interference with the state regulation of real property, and plain vindictiveness. Furthermore, the recording of the agreement, necessary to put the "world" and the defendant on notice of the restricted use of property, was not mentioned by the Supreme Court as state action. The Supreme Court moves in mysterious ways is one answer, however abstract, while another is a recognition that after World War II it was necessary to revitalize the Constitution, to make it more meaningful in a rapidly changing world. To those familiar with legal and constitutional interpretation, such artful dodging is essential to maintain fluidity of social thought and initiate change.[9]

The Fourteenth Amendment was further stretched, or perhaps correctly interpreted, in *Burton v. Wilmington Parking Authority.*[10] The city of Wilmington, Delaware, built a large parking ramp in the city center and private businessmen leased space on the ground floor of this high-rise structure. A restaurateur leasing space refused to serve black customers, and suit was brought under the Fourteenth Amendment, the plaintiff claiming state discrimination. The Supreme Court ruled that on public property the state must take precautions to assure equal access to black and white alike, even when a private lessee controls the property. It is not enough for the state, under these circumstances, to remain neutral. Evidently, if the property is privately owned and controlled, the Fourteenth Amendment is not violated, there being no state involvement.[11] The state, however, is responsible if it leases state property to businessmen and black admission is barred. Put another way, affirmative state action is required on publicly owned property to eliminate racial hostility, even when private industry is solely responsible. On the other hand, affirmative action is not constitutionally required on privately owned property; only by participating in the private discrimination can the state be held responsible under the Fifth or Fourteenth Amendments.

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[9] Terry v. Adams, 345 U.S. 461 (1953); Brown v. Bd. of Education, 347 U.S. 483 (1954).

When a lease is negotiated, the lessor, for all practical purposes, relinquishes control of the premises to the lessee. The lessor retains little more than legal title while the lessee completely controls the property unless restricted by the lease or law. Yet, the Supreme Court in *Wilmington* felt that discrimination on public property was forbidden even though exclusively controlled by the lessee. It could be reasoned that the restaurant enticed many patrons by being located on a public parking ramp, and if the state provides the lure for customers, it is obligated to make certain that blacks are served.

The Supreme Court in essence decided that while state involvement, positive action, is essential on privately owned property, the Fourteenth Amendment condemns state toleration, inaction, on public property. In *Shelley*, there was state action on state property—the recording of the restrictive covenant—which was not labeled discriminatory, while in *Wilmington* the failure of government officials to provide for equal access to the restaurant in the lease is forbidden by the Fourteenth Amendment. *Wilmington* supports the conclusion that the recording of a restrictive covenant violates the Fourteenth Amendment.

The decisions highlighted are of some importance in assuring fair employment. Neither federal nor state agencies can discriminate under the Fifth and Fourteenth Amendments in recruiting, promotion, training, etc., there being direct government involvement. It should be pointed out that in spite of the constitutional guarantees, state and federal agencies openly discriminated until the end of World War II. Woodrow Wilson, while he was president, discharged blacks, segregated toilets and drinking fountains, etc. There was discrimination in employment even under the doctrine enunciated in the *Civil Rights Cases* and *Plessy v. Ferguson* calling for separate but equal facilities. While segregated toilets and drinking fountains could be provided on an equal basis, it was impossible to provide for fair employment on a segregated basis. The pendulum slowly began to swing with *Shelley v. Kraemer*, where direct and indirect government discrimination was outlawed under the Fifth and Fourteenth Amendments. *Wilmington* obviously went further than *Shelley*.

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[10] 365 U.S. 715 (1961). Also see *Reitman v. Mulkey*, 387 U.S. 369 (1967).

[11] Rice v. Sioux City Memorial Park, 349 U.S. 70 (1955).

When *Plessy v. Ferguson* and the *Civil Rights Cases* decisions were made, unions, on the whole, exercised little influence on the industrial and political scene, holding little tangible power. However, after the Wagner Act in 1935, unions quickly achieved considerable economic and political power and, like employers, influenced employment opportunities. *Shelley v. Kraemer* and *Burton v. Wilmington* suggest the applicability of the Fifth and Fourteenth Amendments to reach employer and union discrimination because of the public support for unions.

In *Ethridge v. Rhodes*,[12] a building was to be erected at Ohio State University, and the plaintiffs claimed a Fourteenth Amendment violation because the union supplying workers admitted few blacks to membership and operated a discriminatory hiring hall in spite of an employer agreement with the government to hire fairly. The court ruled in favor of the plaintiffs, stating:

> The Fourteenth Amendment proscription of racial discrimination does not extend . . . to non-governmental persons such as union officials. . . . However, when a state has become a joint participant . . . (with) the proposed contractors acting under contract with unions that bar Negroes—this constitutes a type of "state action" proscribed by the Fourteenth Amendment. . . .
>
> The (state) officials . . . have displayed a shocking lack of concern. . . .[13]

In other words, a government agency letting a contract cannot continue to ignore the discriminatory hiring practices of employers or unions. Even though the union is not a signatory to the agreement between the employers and government, the Fourteenth Amendment controls.

The court in *Ethridge* did not point a finger at employers, noting that the unions in the consruction trades engaged in discrimination. It would be a mistake to fault only unions, as many employers in the construction industry are also guilty of discrimination. If employers in construction were free to hire without union restriction, it still seems likely that there would be a Fourteenth Amendment violation if a governmental agency continued to let contracts where evidence of statistical or intentional discrimination is produced. The Supreme Court decision in *Wilmington* supports such a conclusion.

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[12] 268 F. Supp. 83 (S.D. Ohio, 1967).

[13] For similar cases see *Hadnot v. Laird*. 463 F.2d 304 (D.C., 1972); *Todd v. Joint Apprenticeship Committee*, 223 F. Supp. 12 (N.D. Ill., 1963), 332 F.2d 243 (CA 7, 1964), *cert. dismissed*, 380 U.S. 914 (1964).

Chapter V

THE THIRTEENTH AMENDMENT

The Supreme Court, in the *Civil Rights Cases* decision, decided that the language of the Thirteenth Amendment was not sufficiently broad to bar private discrimination not tantamount to "slavery" or "involuntary servitude." Unless the meaning of "slavery" or "involuntary servitude" was broadened, the Thirteenth Amendment and the federal laws enacted under its umbrella would not provide meaningful help to blacks.

Historically, racially restrictive land covenants and zoning ordinances, railway coaches and pullmans, parks, swimming pools, restaurants, beaches, golf courses, and other publicly and privately operated facilities were kept segregated or closed to the progeny of ex-slaves. After World War II, public officials and others found it difficult to justify exclusion and separate facilities, and a more liberal Supreme Court membership pointed to the possibility of changes in doctrine, even if artful dodging was necessary.

The meaning of "slavery" or "involuntary servitude" could be enlarged. The meanings of many words or classifications are altered with time, stretched beyond original use. People performing unpleasant or tedious tasks refer to themselves as "slaves." The yoke of slavery was never shed, a view widely shared in the black community, constantly exposed to degradation and demands for subservience. To be refused employment and promotion, to be paid less than white workers, and to be segregated in poor schools leads to "involuntary servitude," holding menial jobs because alternatives are limited. Blacks, in spite of the Fifteenth Amendment guaranteeing suffrage, were not permitted to vote in party conventions, primaries, and general elections; were barred from serving on juries in spite of the Fourteenth Amendment; and were segregated in inferior schools, public libraries, churches, and unions, etc. To the casual observer "freedom" for the black was not the "freedom" accorded to the privileged white. Could these "slaps" be classified as "slavery" or "involuntary servitude," remnants of servitude?

The Supreme Court slowly reached private discrimination by digging more deeply to uncover "state action" to make possible finding a violation of the Fourteenth Amendment. If the Supreme Court stand in the *Civil Rights Cases* could be altered after World War II to find Fourteenth Amendment wrongs, the limited interpretation of the Thirteenth Amendment could also be changed. Furthermore, the legislative change already underway to assure fair employment signified the need for constitutional changes. The time had come to petition the Supreme Court to reconsider the meaning of the Thirteenth Amendment.

In *Jones v. Mayer,*[1] the Supreme Court in 1968 reconsidered its interpretation of the Thirteenth Amendment and the meaning of post-Civil War legislation. Southern states during the reconstruction era enacted legislation curbing considerably the freedom and rights of black citizens. Congress, to outlaw the wave of state legislation, passed legislation under the auspices of the Thirteenth and Fourteenth Amendments. Because of the limitation on federal power to that expressly enumerated in the Constitution, Congress, under the Thirteenth Amendment, can only act to prohibit "slavery" and "involuntary servitude." While the Fourteenth Amendment permitted congressional response only after states acted in a discriminatory manner, the Thirteenth Amendment permits legislation even if there is no state wrongdoing. Furthermore, the Thirteenth Amendment, standing alone, is not limited to the correction of public wrongdoing, apparently permitting the federal control of private discrimination.

Congress enacted sections 1981 and 1982 in 1866, which provide:

> Section 1981. All persons . . . shall have the right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .
>
> Section 1982. All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.

Jones v. Mayer arose under section 1982, a decision made by the Supreme Court in 1968, the same year that Congress enacted fair housing legislation. The plaintiffs, black, sued a realtor who refused to sell them a home in a new development. An important question to resolve was whether section 1982 only reached public discrimination, as claimed by the defendant, or whether private discrimination was outlawed as well. The Supreme Court concluded that "section 1982 bars all racial discrimination, private as well as public, in the sale or rental of property . . . a valid exercise of the power of Congress to enforce the Thirteenth Amendment." There was nothing in the Thirteenth Amendment or its legislative history that limited its reach to public "slavery" or "involuntary servitude." In fact, the public, even prior to the Civil War, had not acted as slaveholders, so that the Thirteenth Amendment was primarily designed to reach private wrongdoing. The Supreme Court, to support its position, quoted from a statement made by Senator Trumbull in 1866, that *"(i)t is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell,*

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[1] 392 U.S. 409.

who cannot enforce his rights. . . ." Denying these rights was a "badge of servitude," directly attributable to slavery; "practical freedom," and not just legal freedom, is essential to assure equality. Echoing similar sentiment, Representative Cook said "*(t)he practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people.*" Justice Stewart, writing the majority opinion in *Mayer Realty*, said:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. . . .

In a concurring opinion, significant in situations pertaining to fair employment, Justice Douglas noted that blacks had been barred from unions, dicta since section 1982 guaranteed the right to buy and sell real or personal property. While section 1982 from necessity concerns the right to make contracts if property is to be bought and sold, it did not, at least directly, refer to employment, which involves entering into another type of contract. However, section 1981 guarantees "the right to make and enforce (all) contracts," terminology sufficiently broad to include employment. Since unions as well as employers reacted in a discriminatory fashion toward blacks, Justice Douglas indicated in *Jones v. Mayer* that employment could be reached under the post-Civil War legislation. Like the Phoenix, legislation enacted in 1866 had risen from the dead, dusted off for use in 1968.

The dissenters felt that the majority in *Mayer Realty Co.* had departed from *stare decisis,* no doubt a well-taken position. The fact that the 1866 legislation lay dormant until *Jones v. Mayer* is strong evidence that legal practitioners did not consider the legislation meaningful.

The defendant in *Mayer Realty* also contended that Title VIII, the federal fair housing law, implicitly erased the right of the plaintiff to seek redress under section 1982. Unable to uncover a congressional intent to repeal section 1982 and noting differences between the legislation, the Supreme Court favored a multiplicity of remedies, there being no substantial reason to disallow recovery under either law. Thus, a plaintiff claiming employment discrimination could sue in court under the post-Civil War legislation or the fair employment laws enacted in 1964.

Where unions represent employees, a collective bargaining agreement is negotiated with employers establishing terms of employment. Yet, this does not constitute a contract as called for in section 1981. Perhaps the union-negotiated agreement is more correctly referred to as a master agreement, setting, at the very least, the minimal terms of employment for each employee. But it is the employee who is hired by the employer. In fact, if traditional law is followed, there isn't even a contract entered into at this point, since the duration is not definite (a valid contract must cover an ascertainable period of time). However, broadly viewed, refusals to hire blacks under the same conditions as whites is implicitly or expressly forbidden by the 1866 legislation. Many courts, consequently, adopted the view that section 1981 is an available remedy in spite of the passage of state and federal fair employment laws.[2]

In *Johnson v. Railway Express Agency*,[3] the Supreme Court in 1975 considered whether a complaint made under Title VII tolls or stops the running of the statute of limitations so as to permit subsequent suit under section 1981. This question is particularly pertinent because Title VII only permits back pay for two years. While considering this question, the Supreme Court endorsed lower court decisions holding that section 1981 was a separate and independent remedy not expressly or implicitly superceded by Title VII. Consequently, the complainant is not restricted in a suit brought under section 1981 and can claim back pay in excess of two years. The big question ultimately was whether the suit brought under section 1981 was timely filed.

Unlike Title VII, which specifies the proper time period within which to complain to the EEOC, a time limit was not specified in the 1866 legislation. The Supreme Court, consequently, followed the general rule of construction that a state statute of limitations is followed where none is provided in the federal law. However, "state law may be displaced where . . . application would be inconsistent with . . . federal policy. . . ." The plaintiff contended that there was valid reason to toll the statute of limitations as "premature and extensive litigation . . . would destroy all chances for administrative conciliation and voluntary compliance," but the Supreme Court could not see how congressional policy, as expressed in Title VII, would be thwarted if suit were also permitted under section 1981. But the plaintiff's failure to act timely barred the suit brought under the 1866 law because of the state statute of limitations, that bringing a complaint under Title VII did not stop the running of the state statute of limitations. The dissenters felt that the majority rule resulted in inequity, noting that nothing in the federal law required the simultaneous reach for two remedies. Consequently, the filing of the complaint with the EEOC should toll the state statute of limitations.

The *Railway Express Agency* case clearly establishes the rule that Title

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[2] Local 313, Electrical Workers Union v. U.S., 392 F. Supp. 413 (S.D. Ohio, 1968); O'Connell v. Teachers College, 63 F.R.D. 638 (S.D. N.Y., 1974); League of Academic Women v. Univ. of California, 343 F. Supp. 636 (N.D. Calif., 1972); Macklin v. Specter Freight Systems, 478 F. 2d 979 (D.C. Cir., 1973); Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377 (CA 4, 1972), *cert. denied*, 409 U.S. 982 (1972); Brady v. Bristol-Meyers, Inc., 459 F. 2d 621 (CA 8, 1972).

[3] 10 FEP Cases 817.

VII is not an exclusive remedy in interstate or intrastate commerce. The federal and state laws specify that a minimum number of employees or union members (15) must be involved, while section 1981 protects the plaintiff even if one employee or union member faces discrimination. In addition, while Title VII calls for prior conciliation and adjudication by state agencies, section 1981 permits court suit without having to resort to other state or federal remedies.

There is considerable question as to whether section 1981 protects white women, although black women claiming sex and race discrimination could take advantage of the 1866 legislation. While many white women feel that they too have lived and continue to live in bondage, it is doubtful whether Congress intended to protect those claiming sex discrimination in employment under the Thirteenth Amendment legislation.

Chapter VI

THE FEDERAL LABOR LAWS

The Labor Scene

The decisions made under the Fifth and Fourteenth Amendments by the Supreme Court, like *Shelley* and *Wilmington*, bear a similarity to the decisions made interpreting federal legislation regulating employer-union relations. Congress, the branch of government that should have responded most quickly to eradicate employment discrimination and protect minorities, failed to act until 1964 when the Civil Rights Act was passed. Due to the southern control of congressional committees, lethargy, etc., Congress failed to respond, and those seeking fair play in industry began to look at the labor laws, the Railway Labor Act and the Taft-Hartley Act, as a means of forcing change. Neither act was overtly concerned with the welfare of black employees, and it is unlikely that Congress was even indirectly concerned.

Congress, starting in 1926 with the passage of the Railway Labor Act, contributed substantially to the growth of union power, and if the Fifth and Fourteenth Amendments are judicially usable to reach private discrimination, the clear meaning of *Shelley* and *Wilmington*, the federal labor legislation might be tapped to reach employer and union discrimination even where government involvement is not a factor. Both the Railway Labor Act and the subsequent Wagner and Taft-Hartley Acts were geared to the promotion of collective bargaining and the private resolution of disputes, with government agencies authorized to intervene, via unfair labor practice charges, when employers or unions engaged in legislatively forbidden practices. *Shelley* holds that courts cannot enforce racially discriminatory agreements legally entered into by private citizens, and employers and unions, prompted by federal legislation requiring collective bargaining in good faith, were entering into agreements that were intentional, or, in effect discriminatory. To some extent, there was some government involvement in employer-union relations that encouraged collective bargaining and permitted the continuation of racial discrimination.

Ignoring racial discrimination would not lead to its disappearance—post-Civil War industrial conditions clearly support this conclusion. In fact, the failure to act positively after the Civil War led to a situation where another power structure, unions, added to employment discrimination. The time had come to look at the federal labor laws imaginatively and administratively, and judicially initiate changes however slight.

Unions were not a significant economic and political force until the Wagner Act was passed in 1935. However, the railroad brotherhoods were influential prior to this time. After the Civil War, blacks were excluded from unions or segregated, as in the church, in separate locals. The craft unions during the nineteenth and twentieth centuries excluded blacks from most of the skilled trades and apprenticeships, restricting them to the least desirable jobs when admitted to membership. However, unions prior to 1935 had little bargaining power and even less control over the job market. Employers, unquestionably, were primarily responsible for the failure to provide equal employment opportunities. The railroad brotherhoods after the passage of the Railway Labor Act openly and notoriously practiced racial discrimination, uncontested by employers.

It should be noted that the Railway Labor Act blankets rail and air carriers while the Wagner and Taft-Hartley Acts cover all other employers operating in interstate commerce unless specifically excluded.

The Norris-La Guardia Act of 1932 substantially limited the ability of employers to secure injunctions against unions exerting economic pressures, and the Wagner Act outlawed employer hostility against employees favoring union representation. Some of the leaders of the American Federation of Labor (AFL), later forming the Congress of Industrial Organizations (CIO), preached industrial organization rather than the traditional craft organization common to the AFL. To organize the so-called basic industries—steel, aluminum, rubber, automobile, etc—advocates of industrial organization recognized the need for black support to assure success. In addition, some of the early CIO supporters were a more liberal breed than the hard-core "bread and butter" AFL leaders. One consequence of the Wagner Act and industrial organization was a substantial increase in black membership. To be needed and partially accepted was an important opening wedge promising future change in union representation and goals.

While the CIO leaders, overall, were more liberal than the AFL leaders, by 1938, after the federation split took place, racial prejudice was common enough in both federations. Few blacks joining the CIO held the better paying jobs, initially a sign of employer discrimination, and few advanced after unions gained the right of representation.

Unlike industry, where control and responsibility is centralized, unions joining a federation operate autonomously, free of effective control; as a practical matter, even today the AFL-CIO cannot control some of its affiliates. Within each national or international union, there is considerable local autonomy, making it difficult to promote fair employment policy. It is within this organizational and institutional framework that the Railway Labor Act and Wagner and Taft-Hartley Acts require employers and unions to bargain in good faith over wages, hours, and conditions of work. Union representatives, in addition, are required to represent *all* employees in the bargaining unit in good faith, even those who are not members. But when racial discrimination is a way of life, fair representation is unlikely. And when agreements are negotiated providing for union shops, seniority, and hiring halls, such legal devices are tolerated that often operate discriminately, possible unfair labor practice violations.

The Railway Labor Act

In *Steele v. Louisville & N.R.R.*,[1] to provide jobs in a declining industry for white members, the employer and union negotiated an agreement requiring that white firemen be hired until 50 percent of the employees were white. Prior to the diesel engine, many railroads hired blacks as firemen, considered undesirable jobs when coal was stoked. According to the Supreme Court, an exclusive union representative must bargain fairly for all employees, black and white, in the bargaining unit. The agreement was discriminatory because the employer was required to hire white firemen only until the number of white employees equaled the number of black employees. To conclude that fair bargaining for black employees was not mandatory could have led to questioning the constitutionality of the Railway Labor Act under the Fifth Amendment. To encourage union growth and collective bargaining without trying to stop discrimination may constitute federal inaction prohibited by the Fifth Amendment, a point later developed by the Supreme Court in *Burton.* Where possible, the Supreme Court avoids constitutional questions, achieved in *Steele* by holding that the Railway Labor Act requires fair representation without discrimination.

In related cases in the railroad industry, the rationale advanced by the Supreme Court in *Steele* was further expanded. In *Bro. of R.R. Trainmen v. Howard*,[2] the plaintiffs did not belong to the defendant union, which had contractually limited the number of jobs available to blacks. The Supreme Court again concluded that unions cannot deny the right of employment to employees belonging to another union, even when a jurisdictional dispute has arisen. To prevent blacks from holding jobs constituted unfair representation prohibited by the Railway Labor Act. In *Tunstall v. Bro. of Locomotive Firemen*,[3] the plaintiffs, black employees claiming racial discrimination, were not affiliated with any union. The Supreme Court required the union to fairly represent nonunion employees.

The National Mediation Board determines whether unions can represent a group of employees in the rail and air passenger industries. Since many of the constitutions and by-laws of the railroad brotherhoods forbade black membership until the Civil Rights Act, it seems plausible to reason that certification by the National Mediation Board violated the Fifth Amendment. If segregated schools lead to unequal education, it seems unlikely that unions prohibiting black members can fairly represent them. In fact, there is little likelihood that jobs could be had by blacks under these circumstances. By certifying the white railroad brotherhoods as bargaining representatives, the National Mediation Board was tolerating and promoting racial hostility. Perhaps the easiest and most effective way to prevent discrimination is to deny unions excluding blacks from membership the right of representation. Yet, the National Mediation Board never took this approach. By recognizing the union, the National Mediation Board knew that discrimination was the order of the day unless a court suit claiming unfair representation, expensive and time-consuming, was brought by black employees. Furthermore, it is indeed strange that the National Mediation Board did not decertify unions practicing discrimination, another sign of government participation in private discrimination. In fact, the National Mediation Board has a long history of not addressing itself to employer and union racial discrimination, forcing blacks to bypass the agency and seek direct court relief.

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[1] 1 323 U.S. 1929(1954).

[2] 343 U.S. 768(1952). Also see *Conley v. Gibson*, 355 U.S. 41(1957).

[3] 323 U.S. 210(1943).

The Taft-Hartley Act

The NLRB is charged with interpreting the unfair labor practice charges designated in sections 8(a) and (b) of the Taft-Hartley Act and holding representation elections. The concept slowly developed that unions regulated by the Taft-Hartley Act must fairly represent employees in the appropriate bargaining unit. In *Syres v. Oil Workers Union*,[4] the Supreme Court, in a *per curiam* decision, declared that a union certified by the NLRB as bargaining representative cannot engage in racial discrimination, unfair representation under the Taft-Hartley Act. Because the *Steele*, *Howard*, and *Tunstall* decisions were cited in *Syres*, employees, union members and nonmembers, in firms accountable to the NLRB, are protected.[5] However, many unions legally function as bargaining representatives without NLRB certification, so that the threat of decertification is not meaningful to discriminating unions.

Not only was *Syres* important because fair representation was demanded, but another remedy was opened to possible use, the Fifth Amendment. The NLRB could have taken the position that unions barring black members or maintaining segregated locals could not fairly represent all employees in the bargaining unit. By adopting this position, the NLRB could automatically refuse to certify unions and decertify others where representation is unfair. To tolerate segregation could mean a Fifth Amendment violation. Unions which bar black members or require segregation cannot engage in fair representation, if for no other reason than blacks cannot participate in union affairs and elect officials. However, the NLRB did not take this position until after the passage of the Civil Rights Act of 1964. A most effective means of forcing unions to practice equality is to deny representation when policies and practices are blatantly discriminatory. Where patterns of discrimination are ignored, the NLRB certifying a union appears to be engaging in discrimination per *Wilmington*. While the parking ramp where the discrimination occurred in*Wilmington* was publicly owned and the store was privately controlled by the lessee, the situation bears similarity to the private use of the NLRB. The NLRB found it difficult to rule that segregation and exclusion of blacks from unions was a *per se* violation of the duty of fair representation.[6] Instead, the NLRB initially insisted upon the presentation of evidence after certification that the representation was unfair; exclusion and segregation was not, evidently, tantamount to unfair representation. Section 7 of the Taft-Hartley Act guarantees the right to "join, or assist" labor organizations, a protection extended to union adherents which eventually promotes collective bargaining. It can be reasoned that blacks segregated or excluded from a union cannot "join, or assist," which creates a high probability of unfair representation. While section 7 protects employees from employers harboring anti-union motives, unions presumably can fairly represent blacks in the bargaining unit who cannot "join, or assist." The Taft-Hartley Act did not in any way limit the right of unions to control admissions, but unions cannot be assisted if *all* black employees are without voice in internal affairs, which ultimately reaches fair representation and fair bargaining. Exclusion or segregation means that job discrimination is inevitable. But the board, until Title VII, felt that Congress had not authorized it to rule upon the membership policies of unions.[7] Yet, the board for other reasons refused to certify unions.[8]

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[4] 350 U.S. 892(1955).

[5] Also see *Ford Motor Co. v. Huffman*, 345 U.S. 330(1953).

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[6] Atlanta Oak Flooring Co., 62 NLRB 973(1945); Larus & Bro. Co., 62 NLRB 1075 (1945); Veneer Products, Inc., 81 NLRB 492(1949); Andrews Industries, Inc., 105 NLRB 946(1953); Pacific Maritime Assn., 110 NLRB 1647(1954); Stickless Corp., 110 NLRB 2202 (1954). For cases indicating that certification or bargaining order under section 8(a)(5) can be denied see *NLRB v. Mansion House*, 82 LRRM 2608 (CA 8, 1973; Bell & Howell Co., 87 LRRM 1173 (NLRB, 1974); Bekins Moving & Storage Co., 86 LRRM 132 (NLRB, 1974). Note that exclusion and segregation violates Title VII.

[7] Pacific Maritime Assn., 110 NLRB 1647(1954), *reconsidered*, 112 NLRB 1280 (1955).

[8] AFL v. NLRB, 308 U.S. 401(1940); Inland Empire Dist. Council v. Millis, 325 U.S. 697(1945).

Evidently ample protection is accorded minorities if unions can be decertified. As a matter of fact, few unions are decertified for any reason. Title VII specifies that minorities cannot be excluded or segregated, so that the NLRB is implicitly authorized to consider the racial practices of unions before certification. Even unions not certified by the NLRB cannot segregate or otherwise discriminate under Title VII.

Racial appeals and slurs have been resorted to by employers and unions during the course of representation elections. Section 8(c) of the Taft-Hartley Act protects employer and union speech; employers engage in racial appeals to curb union organization and representation while unions make similar appeals to win employee support. Where fair employment legislation (state or federal) controls, employer or union statements carrying racial overtones are solid evidence of discrimination. But the NLRB mandate from Congress is different, dealing with questions of fair representation and unfair labor practice charges. Generally speaking, the NLRB takes the position that racial appeals constitute protected free speech per section 8(c) if truthful and temperate.[9] Yet, truth and temperance are unimportant under Title VII, but union appeals to blacks constitute protected free speech under the Taft-Hartley Act.[10]

The NLRB will challenge an election if rumors are circulated that blacks will be thrown out of their jobs unless they join the union or if blatant bias is exihibited.[11] The NLRB seems to feel that appeals to racial prejudice, either to join or not join unions, are inevitable; witness political campaigning during an election to gain support. This type of appeal may be necessary to effectively campaign in union and public elections. If the inaccurate or exaggerated statements are truthful or not misleading, section 8(c) protects speech uttered during the course of a union election even if prejudiced.[12] It may also be necessary to draw a distinction between speech intended to inflame racial hatred and speech encouraging racial pride and the desirability of union organization; the former cannot be tolerated while the latter has social merit.

The unfair labor practice charges specified in sections 8(a) and (b) of the Taft-Hartley Act are more difficult to interpret than the representation provisions. Section 7 protects the right of employees to join or not join a union unless a valid union shop agreement is negotiated. Per section 14(b), states can ban, by enacting right-to-work laws, union shops and lesser forms of union security like the agency and maintenance-of-membership shops. Sections 8(a) (1) and 8(b) (2) forbid employer and union restraint and coercion to protect the rights guaranteed to employees in section 7. Sections 8(a) (5) and 8(b) (3) require employers and unions to bargain in good faith over wages, hours, and conditions of work. Section 8(a) (3) prohibits "discrimination in regard to hire or tenure of employment . . . to encourage or discourage union membership," while section 8(b) (2) follows section 8(a) (3), prohibiting union discrimination against employees which encourages or discourages membership. The unfair labor practices are not specifically directed to racial (or sexual) discrimination and employers and unions can promulgate shop and membership rules which can be discriminatory.

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[9] Sharnay Hosiery Mills, Inc. 120 NLRB 750(1958); Allen-Morrison Sign Co., 138 NLRB 73(1962); Westinghouse Elec. Co., 118 NLRB 364(1957); Mead-Atlanta Paper Co., 120 NLRB 832(1958); Ambox, Inc., 146 NLRB 1520(1964).

[10] Archer Laundry Co., 150 NLRB 1427(1965). But see *NLRB v. Shapiro & Whitehouse, Inc.*, 356 F.2d 675(CA 4, 1966).

[11] NLRB v. Staub Cleaners, Inc., 357 F. 2d 1 (CA 2, 1966); Chock Full O'Nuts, 120 NLRB 1296(1958); Petroleum Carrier Corp., 126 NLRB 1031(1960); Boyce Mach. Corp., 141 NLRB 756(1963); NLRB v. Empire Mfg. Co., 120 NLRB 1300(1958), *aff'd*, 260 F. 2d. 528 (CA 4, 1958); Westinghouse Elec. Corp., 119 NLRB 117(1957); Universal Mfg. Co., 156 NLRB 132(1960).

[12] Gummed Prod. Co., 112 NLRB 1092(1955); Archer Laundry Co., 150 NLRB 1427(1965).

The NLRB opened the door to the application of the unfair labor practices to racial discrimination in *Miranda Fuel*[13] when it ruled that unfair representation could constitute a violation of sections 8(a) (1) and 8(b) (1). While *Miranda* did not involve racial discrimination, the NAACP and American Civil Liberties Union intervened, recognizing the importance of this decision. Subsequent decisions made by the NLRB hold that sections 8(a) (1) and 8(b) (1) are applicable to employers[14] and unions[15] guilty of racial discrimination. A controversial decision was made by the NLRB in *Hughes Tool Co.*[16] The Metal Workers Union, prior to the passage of the Civil Rights Act, chartered separate locals for blacks and whites, which received NLRB endorsement. In addition, the collective bargaining agreement was racially discriminatory. A black employee bid for an opening as an apprentice and was turned down by the employer. The black requested the white local, which controlled the grievance and arbitration procedure, to process his grievance, a request denied by the union. In a split decision, the board expanded upon concepts first enunciated in *Miranda* by holding that sections 8(b) (1), (2), and (3) were violated by the union without holding the employer responsible under section 8(a). Section 8(b) (1) was violated because union membership was discouraged by disparate treatment for black employees. In addition, the union violated section 8(b) (3) by refusing to process the black grievance, evidence of bargaining in bad faith. While all board members agreed that unions guilty of racial discrimination can be decertified and that section 8(b) (1) was a proper remedy, the board split on whether separate locals for black and white constituted a per se violation. Some board members felt that section 8(b) (1) did not outlaw the use of separate locals because section 7 did not require fair representation. The dissenters also felt that sections 8(b) (2) and (3) were not violated because the white local had not been afforded an opportunity to refute the charges and these provisions were not designed to reach racially unfair representation.

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[13] 140 NLRB 181(1962). The NLRB decision was reversed for lack of evidence of discrimination in *NLRB v. Miranda Fuel Co.*, 326 F. 2d 172 (CA 2, 1963).

[14] NLRB v. Intracostal Terminal, Inc., 286 F. 2d 954 (CA 5, 1961); Robt. Meyer Hotel Co., 154 NLRB 521 (1965); NLRB v. Tanner Motor Livery, Lts., 349 F. 2d 1(CA 9, 1965); Durant Sportswear, Inc., 147 NLRB 906(1964); Associated Grocers of Port Arthur, Inc., 134 NLRB 468(1961); Certain-Teed Products Corp., 153 NLRB 495(1965).

[15] Local 1367, Longshoremens Union, 148 NLRB 897(1964); Local 12, Rubber Workers Union, 150 NLRB 312(1964); 368 F. 2d 12, *cert. denied,* 389 U.S. 837(1967); Teamsters Union v. NLRB, 379 F. 2d 137 (D.C. Ark., 1967).

[16] 147 NLRB 1573(1964). Also see *United Packinghouse Workers v. NLRB*, 416 F. 2d 1126, *cert. denied,* 396 U.S. 903(1969).

Charges of employer discrimination are brought before arbitrators. The great bulk of the collective bargaining agreements—*Hughes Tool Co.*[17] is one example—provide for arbitration as the ultimate step in the grievance procedure and arbitrators, under provisions found in collective bargaining agreements, are called upon for interpretation. Arbitration is a valuable means of maintaining industrial peace and assuring compliance with the terms of agreements frequently in dispute. The best of contracts contain general clauses that can, in good faith, have different meaning to different people and arbitrators. Arbitrators are then requested as neutral decisionmakers to solve disagreements. In recent years, more racial and sex disputes are submitted to arbitration, the costs typically shared by employers and unions, even though other remedies are available to the grievants. There should be some public concern with grievants pressing racial disputes before arbitrators, for reasons that are apparent.

Prior to the passage of the Taft-Hartley Act, courts took the position, for reasons that are not easily supported, that an agreement to arbitrate could not be enforced and that arbitration awards could be altered or reversed in court. In 1957, the Supreme Court, while interpreting section 301 of the Taft-Hartley Act, which permits "(s)uits for violation of contracts . . . in any district court," ruled that agreements to arbitrate could be enforced by court order.[18] Unless the agreement did not provide for arbitration or the subject matter was excluded, employers must arbitrate if requested by unions. Since the Taft-Hartley only approves of arbitration (section 301 does not even refer to arbitration), the Supreme Court reversed the common law rule.

An important factor considered by the Supreme Court in *Lincoln Mills* was the failure of Congress to provide substantive or procedural guidance in the Taft-Hartley Act. The Supreme Court overcame this difficulty by directing the lower courts to establish rules on an ad hoc basis as cases are adjudicated. As lower court decisions were made, differences of opinion were expressed among the district and appellate courts that had to be resolved by the Supreme Court. Rising to the occasion, the Supreme Court established rules to regulate arbitration in three cases decided on the same day.[19] While these decisions did not involve race discrimination, they are nevertheless applicable and perhaps hinder the public goal calling for fair employment. In the three decisions made in 1960, the Supreme Court elected to support the arbitrators' decisions, whatever they were. Unless limited by the collective bargaining agreement, the arbitrators' decisions were binding and final, denying contestants the right to seek court review. If arbitrators decide that the agreement authorized the decision, courts would seldom question the award. Even if the arbitrator's interpretation of the agreement is wrong, judges could not substitute their opinions for that of arbitrators, providing the collective bargaining agreement expressly or implicitly authorized the award. The Supreme Court felt that the sole function of courts under section 301 is to decide whether the agreement permits the award; unlike a suit initially commenced in a court or before an administrative agency, appellate review was not required of an arbitrator's decision. The Supreme Court felt that judges should not substitute their opinions for those made by experts. In addition, the other advantages of arbitration—speed, cost, informality, etc.—pointed to the advisability of limiting the role of courts in airing industrial disputes.

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[17] 140 NLRB 181(1962).

[18] Textile Workers Union v. Lincoln Mills, 353 U.S. 448(1957).

An illustration of the strong and unwavering support the Supreme Court has given to the arbitration process is the 1974 decision in *Gateway Coal Co. v. U.M.W.*,[20] favoring the arbitration of safety in mines, matters of private and public concern. In spite of the public interest in mine safety and the tendency of arbitrators to make compromise decisions, the Supreme Court could not find sufficient reason to ban or limit safety disputes brought to arbitration. Parties to a collective bargaining agreement, evidently, should be free to select arbitrators whom they respect and trust without badgering from the judicial system. Given this overall framework of judicial trust and protection, complaints pertaining to race, sex, age, health, and other forms of employment discrimination can be arbitrated unless specifically exempted by contract.

Given the time and circumstances surrounding the *Lincoln Mills* and

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[19] Steelworkers Union v. American Mfg. Co., 363 U.S. 564(1960); Steelworkers Union v. Warrior & Gulf Navigation Co., 363 U.S. 574(1960); Steelworkers Union v. Enterprise Wheel & Car Corp., 363 U.S. 593(1960).

[20] 94 S. Ct. 629.

Steelworkers decisions, it is difficult to quarrel with the social philosophy pronounced. There was a definite need to promote arbitration and restrain judges from imposing their brand of justice, sometimes antiquated. But the growth of civil rights arbitration in recent years and other special problems, such as mine safety, points to the need to reconsider the absolute and unqualified endorsement made by the Supreme Court. When these decisions were made, the interests of grievants and union representatives meshed and there was no reason to fear an absence of fair play (this facto is obvious in *Gateway Coal Co.*). Where racial discrimination is the basis of the grievance, employer and union interests may coincide, the welfare of black grievants unimportant, possibly resorting to arbitration to avoid Title VII or state FEP adjudication where the penalty could be much more damaging. Employers and unions have been known to pay lip service to fair employment, and black grievants, even with a favorable award, could be denied complete satisfaction.

The Supreme Court has ruled that in the absence of evidence of arbitrary and discriminatory conduct, unions have the right to request or refuse to seek arbitration.[21] The Supreme Court felt that unions must be in a position to control the machinery provided by contract to settle differences in order to buoy employer confidence in the ability of unions to control members, protect employers from frivolous charges, and encourage the renegotiation of arbitration clauses.

Employers and unions are naturally interested in selecting arbitrators holding views most favorable to their positions. The selections of arbitrators, consequently, are compromises rather than first choices. But where employer and union interests coincide, arbitrators selected are easily agreed upon, those who are most likely to favor their interests and not grievants. For example, it is most unlikely that staunch supporters of the American Civil Liberties Union or N.A.A.C.P. would be appointed to arbitrate disputes involving racial discrimination. Union leaders assume political roles and request arbitration to maintain goodwill and/or prevent the adjudication of disputes in a forum where the result may be less satisfactory. In recent years, considerable publicity has been extended to large awards, millions of dollars, rendered against employers under Title VII. Should large sums be awarded to grievants, it can be safely assumed that few, if any, would be appointed arbitrators in the future. The fact that unions and employers share the costs of arbitration, costs that are insignificant in comparison to the possibility of large awards by courts or commissions, is inconsequential given the alternative.

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[21] Vaca v. Sipes, 385 U.S. 895(1967). Also see *Hines v. Anchor Motor Freight, Inc.*, 91 LRRM 2481 (Supreme Ct., 1976).

The Supreme Court in 1974 to some extent recognized the differences between administrative and court remedies and arbitration awards.[22] Consequently, the grievant unsuccessfully claiming racial discrimination before an arbitrator is not barred from seeking relief under Title VII.[23] The Supreme Court advanced the following rationale to justify the availability of more than one remedy:

1. Title VII does not mention arbitration as an alternate or substitute remedy.
2. Congress favored a multiplicity of remedies.
3. Title VII and arbitration procedures differ considerably.
4. Arbitrators are chosen for their technical and industrial expertise to follow industrial practices and not the law. Furthermore, awards are seldom subjected to court review.
5. Title VII was designed to protect the interests of employees, not employers and unions.
6. Arbitrators are not obligated to follow the law, only the collective bargaining agreement.

While sound reasons can be advanced to support the integrity of the collective bargaining agreement, they are not persuasive if the needs of civil rights grievants are paramount. Grievants do not negotiate the collective bargaining agreement, cannot, typically, challenge union control of the arbitration procedure, and awards cannot be challenged in court, even if contrary to Title VII. In essence, the promotion of civil rights and industrial peace are not always compatible goals, and it would be unwise to subvert the goal of fair employment to assure employer-union peace. The 1974 Supreme Court decision permitting a multiplicity of remedies implicitly endorses this rationale.

While civil rights grievants dissatisfied with an award can proceed under Title VII, there is little reason to believe that many will do so. In fact, it seems fair to conclude that appetites for fair play are chilled by adverse awards. For this reason, the manner in which arbitrators are selected merits further comment. Dependent upon the goodwill of employers and unions for future assignments, a situation is created whereby compromise decisions are made to maximize goodwill and minimize offense to employers and unions, even when compromise is unwarranted. While compromise may be a legitimate approach, it may be uncalled for morally and legally in civil rights disputes. No claim is made that such self-serving awards are easily spotted. However, arbitrators are suspect if unnecessarily apologetic,[24] the civil rights grievant is favored but a trial promotion is ordered, back pay is minimal,[25] etc.

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[22] Alexander v. Gardner - Denver Co., 94 S. Ct. 1011.

[23] The NLRB, to some extent, has taken a different approach, refusing to entertain unfair labor practice charges where the arbitration award seemed to follow the dictates of the Taft-Hartley Act. See *Spielberg Mfg. Co.*, 112 NLRB 1080(1955) and *Collyer Insulated Wire*, 192 NLRB 150(1971).

Some arbitrators claim that they function best when bridging differences between employers and unions, serving more or less as mediators with authority to make binding decisions. Arbitrators holding to this philosophy can retard state and federal attempts to assure and speed fair employment. Some arbitrators split differences more from a need to assure future appointment than from firm conviction.

Arbitrators should be competent and fair, but employer-union selections are often based upon charismatic qualities and known or suspected positions on specific issues. Considerable pressure is placed upon arbitrators to service those who select them, rather than grievants claiming discrimination. For the following reasons, arbitration may be a less desirable forum than others:

1. Employers and unions "shop" for arbitrators whose opinions are predictable and tolerable. Even where arbitrators are well-known and reputed to be competent, their views are carefully investigated before selection, the investigators looking at published awards, association or union listings, opinions solicited from friends, or firms are hired to secure this information. It seems reasonable to assume that arbitrators taking strong positions on civil rights, willing to impose large penalties on employers and unions, will not be selected.
2. Racial discrimination questions are more emotional and difficult to deal with than others. Since unions and employers negotiating discriminatory agreements stand to lose, they tend to support each other rather than act in adversarial capacities. Theinterests of grievants under such circumstances are secondary at best.
3. Arbitrators, as others, are economically motivated, reluctant to rock the boat and jeopardize personal income. Arbitrators are supposed to

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[24] Where arbitrators are unnecessarily apologetic, it may indicate compromise. See *American Mach. & Foundry Co.*, 66-1 CCH Lab. Arb. Awards TT 3110(1965); *Lockheed-Georgia Co.*, 54 Lab. Arb. 769(1970); *Allison Steel Mfg. Co.*, 53 Lab. Arb. 101 (1969); *Hercules Box Co.*, 52 Lab. Arb. 79(1968); *Oldberg Mfg. Co.*, 51 Lab. Arb. 509(1968); *McCall Corp.*, 49 Lab. Arb. 183(1967); *American Airlines, Inc.*, 48 Lab. Arb. 705(1967); *Minute Maid Co.*, 63-2 CCH Lab. Arb. Awards TT 4893(1963); *Kearney Corp.*, 62-2 CCH Lab. Arb. Awards TT 5033(1962).

[25] I-T-E Imperial Corp., 55 Lab. Arb. 1284(1970); Gross Distr., Inc., 55 Lab. Arb. 756(1970); Frito-Lay, Inc., 54 Lab. Arb. 1142(1970); Avco Corp., 54 Lab. Arb. 165 (1970); American Enka Corp., 54 Lab. Arb. 562(1969); Allegheny Airlines, 48 Lab. Arb. 231(1966); Int'l Paper Co., 47 Lab. Arb. 896(1966); Paterson Parchment Co., 47 Lab. Arb. 260(1960); Northwest Airlines, Inc., 46 Lab. Arb. 238(1966); Lockheed-Georgia Co., 66-3 CCH Lab. Arb. Awards TT 6686(1966); Braniff Airways, Inc. 48 Lab. Arb. 769(1965).

be neutral, but it is less than realistic to assume that their need for employer-union goodwill will not color their decisions. Federal judges are not free of personal bias, but the system of assignment permits them to make choices that are not geared to the pocketbook (there are some exceptions).

4. An arbitrator's decision is, for all practical purposes, irreversible. If dishonesty is not established and procedural due process is granted, the grievant cannot overturn the award in court. While *Denver-Gardner* protects grievants seeking aid under Title VII, it seems that few grievants will seek help after losing before an arbitrator.
5. Even if pressing hard to prevent employment discrimination, there is some consensus of opinion that, on the whole, union officials representing grievants during arbitration are less capable than management representatives. If this allegation is correct, then the manner in which complaints are presented to arbitrators creates problems for grievants.

Chapter VII

THE EXECUTIVE ORDERS

Evidence accumulated during the twentieth century convincingly demonstrated that discriminatory employment practices were the rule rather than the exception. Even during World War II, when there was a critical shortage of labor, discrimination abounded, and it was clear that laissez faire and government neutrality in the marketplace could not be tolerated politically to assure success in the battlefields. After all, Keynesian economics called for government intervention in the marketplace to spur consumption and investment, thereby stimulating employment, and a laissez faire policy toward discrimination during wartime would lead to ridicule. Until the adoption of Keynesian philosophy, the federal government playing at laissez faire could claim some degree of consistency when discrimination in employment was ignored. To continue to follow the same policy toward the black, even without another European war, after the government effort during the depression, would have been indefensible.

The inability of Congress to respond quickly and efficiently to assure military victory in Europe was apparent, but, most unfortunately, the news media did not zero in on the shortcomings of Congress. Not until Nixon was elevated to the presidency was there considerable criticism of the abdication of the legislative role constitutionally assigned to Congress. Congress investigated discrimination—the tea time of Congress—but characteristically failed to respond and the executive branch of government was obliged to carry the political ball. The federal government was in a unique position to push fair employment, being a huge purchaser of war goods from private industry. The president in particular, his power expanded during wartime, was in a unique position to push fair employment in government and industry.

When A. Phillip Randolph, president of the Sleeping Car Porters Union, threatened to organize a march on Washington, D.C., in 1942 to end discrimination, President Roosevelt, to avoid damaging international publicity and disruption of the war effort, was forced to act. The United States, threatened by the expansionist policies of Nazi Germany and somewhat uncomfortable with the persecution of European Jews, Poles, and others, would be embarrassed by the threatened march, calling attention to discrimination in the United States. In essence, the United States was criticizing Germany for that which was, to a lesser degree, common in the

United States. While the black, Chicano, and Indian were not gassed, the badge of servitude placed upon them by white America was oppressive. An astute politician, President Roosevelt did not want the war effort bogged down internally and challenged internationally. In all fairness to Roosevelt, he probably believed that those facing discrimination were entitled to fair play.

On June 25, 1941, President Roosevelt announced Executive Order 8802, which required that all federal contracts let to private corporations contain a clause prohibiting racial and religious discrimination. Roosevelt sought to accomplish by contract that which Congress and the judiciary had been initially unwilling to provide—fair play in industry. Appealing to patriotism and their pocketbook, businessmen signed contracts with the government calling for fair employment. In fact, to do otherwise would invite bankruptcy and considerable adverse publicity. Businessmen knew that the government could insist upon the inclusion of a fair employment clause; to fight this in court would be unfruitful and damaging to the corporate image.

Besides, businessmen seeking legal counsel would be told that the call for equality in the Constitution and federal legislation enacted in the past were not enforced, either because of court interpretation, lack of complaints, difficulty of proving allegations, costs of seeking court remedies, etc. If past performance was an indicator of future government commitment, businessmen could ignore the fair employment clause in the contract, that it would not be enforced. In fact, the government would not look too closely at industrial discrimination, as winning the war would hold top priority. To negotiate a contractual clause providing for fair employment is one thing—to enforce it is another story. Any attorney with some civil rights or labor experience is aware of the difficulty of pushing fair employment.

Executive Order 8802 called for the establishment of a Fair Employment Practice Committee of five, later increased to seven, to investigate complaints and to persuade violators to follow a fair employment policy. In addition, the committee could hold hearings, later uncovering evidence of widespread discrimination by large and small employers in metropolitan areas. Since discrimination in the private sector was openly and legally tolerated after the Civil War, the evidence uncovered by the commission was not unexpected. Outside of publishing findings supporting the claims of black leaders that discrimination in employment was the rule rather than the exception, nothing was accomplished, the committee lacking authority to punish violators.

Because of continuing pressure from black leaders, President Roosevelt issued Executive Order 9346, establishing a new committee with increased authority to maximize the production of war goods and assure fair employment. Not only would contracts let to private industry call for fair employment, but the committee could accept, investigate, and decide whether employers violated agreements. In addition, subcontractors were required to hire without discrimination if the work was essential to the war effort. The committee was also authorized to deal with discriminatory complaints brought against federal agencies.

The committee could not hear charges against retailers, unless they held government contracts, firms in intrastate commerce and the Armed Forces. But the jurisdiction of the committee was far-reaching, capable of wielding considerable power. One stumbling block to the effective operation of the committee was unions. Unions, growing powerful after the passage of the Wagner Act in 1935, could thwart the fair employment effort through discriminatory rules of admission, unfair representation, and by negotiating agreements with employers calling for closed, preferential, or union shops, seniority clauses, apprentice training programs, and hiring halls, all potentially damaging to minorities. The committee decided not to adopt rules hitting at union discrimination affecting minority employment, a controversial decision given the presidential directive to contain racial discrimination. But the union capacity to discriminate is of limited consequences when employers are free to hire anyone they please.

The procedure established by the committeee to deal with complaints was a model later followed by the states enacting fair employment laws. The committee would not investigate a firm unless a signed complaint was submitted. The "soft-sell" approach was adopted, the discriminating employer asked to mend his ways and follow public policy decreed by Executive Order 9346 if evidence supported the complaint. The employer mending his ways was not subject to unfavorable publicity or economic or legal punishment. However, if the employer refused to respect the committee finding, a public hearing was held, the veil of secrecy lifted, and a formal decision was made. While the committee could not seek court enforcement of its decision should the employer refuse to comply, pressure tactics could be utilized. The contract could be canceled, manpower requirements reduced,[1] United States Employment Service facilities denied, or future contracts refused. There seems to be little doubt that economic pressures can be effective to convince employers that they must end discrimination. It is doubtful that economic pressure was applied as effectively as it might have been; to disrupt the producers of war goods by insisting upon total commitment to fair employment seemed suicidal to many. To end discrimination in employment would have required a commitment that the executive branch of government was not ready to undertake.

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[1] During World War II, the government could increase or decrease the number of employees employed by an employer. Decisions were supposedly based on war priorities.

Considerable evidence of racial hostility in industry was uncovered and the scarcity of labor, aided by committee effort, led to some abatement in job discrimination. Employers found responsible for violating Executive Order 9346 were among the Who's Who of the industrial elite. Of interest was the acceptance of evidence to establish guilt that would not have been accepted in the courtroom. The big spurt in regulation starting during the 1930s was administrative rather than judicial, and administrative agencies were not required to follow the hearsay rules of evidence. The committee fell in step, following evidentiary ground rules adopted by other administrative agencies housed in the executive branch of government. To have followed the courtroom rules of evidence could have dampened the limited success experienced by the committee.

Another conclusion to be drawn from the wartime experience of the committee was that government neutrality toward industry, the clear meaning of the *Civil Rights Cases,* would not end discrimination. Nothing would change if government did not take an active and forceful hand in the private sector. While some economists to this day believe that employers are only interested in profit and willingly hire the best irrespective of color, evidence gathered by the committee points to the inaccuracy of this position. Blacks, if hired, were paid less for the same work performed by whites and promotion opportunities denied, an intolerable situation in a society in which the consumption and investment function, as called for in Keynesian economic theory, is a government responsibility.

Between 1940 and 1944, 470,000 blacks, mostly unskilled, emigrated from the South to the North. Even unskilled and poorly educated whites would face difficulty after the war ended finding employment with a future if unskilled; the employment problems of blacks multiplied considerably after 1945. Many blacks were employed in wartime industries, gaining little skill, and experienced difficulty in a peacetime economy. If skilled blacks faced problems securing suitable employment—the barring of blacks in professional athletics until after World War II is an example—employers and unions would not welcome unskilled blacks, relegating them to those jobs not wanted by whites. Furthermore, women were hired during wartime as blue collar employees, creating a situation where another group denied fair employment would later compete with blacks for the same jobs. Forceful government leadership was essential to minimize discrimination in the short run and hopefully wipe it out in the long run.

Executive Order 9346 was meaningful, pointing to other racial irregularities. If covered firms are to strive for fair employment, state and federal agencies could not be permitted to discriminate with impunity. While the

Fifth and Fourteenth Amendments prohibit state discrimination in employment, all-white police forces, fire departments, and school systems, primarily due to discrimination was evident. The operating political systems assured white control at all levels of government, control actively sought, which was inevitably reflected in the hiring process.

The War Labor Board established in 1942 was also forced to face problems pertaining to racial discrimination in employment. To minimize disruption, the War Labor Board ordered employers to negotiate nondiscriminatory agreements even though they insisted that disruption would follow. Some employers were ordered to publicize fair employment policies. The board faced questions of unequal pay for blacks and denial of promotions. Like the committee enforcing Executive Order 9346, the War Labor Board also accumulated considerable evidence of employer discrimination.

Government experiences during World War II pointed to several "facts of life" that would have to be faced if fair employment were to be assured. First, the education of blacks, particularly southern blacks, was inadequate, creating industrial disadvantages for them. The committee enforcing Executive Order 9346 opened opportunities at the unskilled and semi-skilled levels, but pushing equality at the skilled, managerial, and professional levels was more difficult, given the level of education and experience of blacks. Many jobs required high school and college diplomas, a growing phenomenon in a society which substitutes technology for labor. Many blacks, Mexican-Americans, and Indians failed to complete high school, let alone continue their education. Especially in the managerial and professional categories, the entré and key to success was the college diploma. The education, supplies, and facilities provided for minorities were, in addition, inferior to those provided in the white communities.

A difficult problem of education not faced up to even today is motivating minority school children who are less influenced in the classroom than in the home and street. To motivate children in the classroom requires some hope for economic success, denied most blacks at all levels. To upgrade minorities economically, not only would government agencies have to act forcefully, but motivation and education needed considerable uplifting. If parents did not achieve or anticipate success, their children could not anticipate moving upward economically. If peers on the streets laughed at school and promises of opportunity, teachers would find it difficult to motivate pupils.

Every president since Roosevelt has issued an executive order forbidding discrimination by employers holding government contracts. Each president, especially Johnson, has stamped his thinking on fair employment policies by issuing executive decrees. On July 26, 1948, President Truman promulgated Executive Order 9980, going beyond the Roosevelt decrees by requiring fair employment in the federal government and designating an official in each agency as a compliance officer. Within the Civil Service Commission, a Fair Employment Board was created to advise all agencies on racial matters and to hear racial complaints. In 1951, President Truman announced Executive Order 10,308, creating the Committee on Government Contract Compliance to review contracts and assure compliance. Evidence was mounting that employers were not living up to their agreements and the federal government was slack, even negligent, in demanding compliance.

President Eisenhower in 1953 issued Executive Order 10,479, reaffirming the Truman orders while abolishing the Committee on Government Contract Compliance, replaced by the President's Committee on Government Contracts. The committee accepted complaints made against government contractors, forwarding them to the contracting agency for solution and disposition; the contracting agency then notified the committee of the ultimate disposition. The Eisenhower order permitted the cancellation of contracts awarded to discriminating employers. In 1955, President Eisenhower established the Committee on Government Employment Policy to deal with discriminatory employment practices in federal agencies.

During the Kennedy and Johnson regimes, Executive Orders 10,925, 11,114, 11,246, and 11,375 were initiated to improve fair employment practices in private industry. Executive Order 10,925 delegated considerable authority to the committee, which could blacklist and initiate complaints against contractors. Executive Order 11,114 was aimed at the construction trade unions, blatantly discriminating against blacks. In addition, a new contractual wrinkle was added requiring affirmative hiring and promises from unions to stop discrimination.

The Johnson Executive Orders, 11,246, as amended by 11,375, set the tone later followed by the Nixon and Ford administrations; the Johnson orders were more innovative and potentially more effective than past orders. Executive Order 11,246 abolished the President's Committee on Equal Employment Opportunity, replaced by the secretary of labor who was charged with enforcing the contract compliance program. Within the Department of Labor, the Office of Federal Contract Compliance (OFCC) was delegated authority to enforce the order. Part I of Executive Order 11,246, which prohibited discrimination by federal agencies, has been superseded by the 1972 congressional amendments to Title VII, assigning jurisdiction to the Civil Service Commission to hear complaints. Based on Title VII, the complainant dissatisfied with the Civil Service Commission efforts and decision can bring suit in a federal district court (the EEOC cannot accept complaints from federal employees). In 1967, Executive Order 11,375 issued by President Johnson added sex to the list of prohibited discriminatory practices, requiring affirmative action as well as fair employment.

Executive Order 11,246 regulates prime and subcontractors. In addition, construction projects partially or fully financed with federal funds are singled out for special attention. Executive Order 11,246 provides that contractors can be required to secure nondiscriminatory promises in writing from unions to assure compliance. Section 203(d) requires the secretary of labor to notify the EEOC, Department of Justice, and contracting federal agencies when unions refuse or fail to cooperate. In addition, an investigation prior to awarding a contract is required by the OFCC of all nonconstruction contracts in excess of $1,000,000; however, investigation can be required even if less than $1,000,000.

Should the nondiscriminatory stipulation or affirmative action mandates be broken, contracts held by prime or subcontractors can be canceled and future contracts denied. However, a formal hearing is necessary before a permanent ban can be imposed or a contract canceled. In addition, the contractor can be sued by the contracting agency for damages for breach of contract and the additional costs of negotiating a new contract.[2] The names of violators can also be publicized. However, those injured by the discrimination are not authorized to bring suit and the third party beneficiary contractual theory is not applicable.[3] The OFCC is not a party to the agreement and cannot sue when violations occur. In addition, if discrimination is charged, or a pattern of discrimination emerges under Title VII, or the employer makes a false statement to the contracting agency, the EEOC, since 1974, can bring suit (prior to 1974, the Department of Justice brought suit). Criminal charges can also be preferred.

Perhaps the most controversial use of executive power has been the requirement of affirmative action, employers promising to recruit minority and female help. Advocates of affirmative hiring feel that the government is obligated to end racial discrimination as quickly as possible, atoning somewhat for past discrimination that has current effect. In addition, minorities and women have to be encouraged to apply for jobs, unaware of openings. The affirmative action requirement also constitutes implied recognition that ending discrimination is a slow process unless employers and unions are continually forced to make improvements.

Section 202 of Executive Order 11,246 requires every government contractor to hire and recruit affirmatively. In addition, subcontractors and unions, nonsignatories, must enter into similar agreements with the prime contractors.[4] Section 301 also requires every contractor seeking "federal financial assistance," like "approval of any grant, contract, loan, insurance, or guarantee," to undertake affirmative recruiting and secure similar agreements from subcontractors.

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[2] U.S. v. Papermakers Union and Crown Zellerbach Corp., 282 F. Supp. 39 (La., 1968), 416 F. 2d 980 (CA 5, 1969), *cert. denied*, 397 U.S. 919(1970).

[3] Farmer v. Phil. Elec. Co., 329 F. 2d 3(CA 3, 1964); Farkas v. Texas Instrument Co., 375 F. 2d 629 (CA 5, 1967) *cert. denied*, 389 U.S. 977(1967). Also see *Trustees of Tufts College v. Volpe Const. Co.*, 264 N.E. 2d 676 (Mass., 1970); *Todd v. Joint Apprenticeship Com.*, 223 F. Supp. 12 (N.D., Ill., 1963); *Hadnott v. Laird*, 317 F. Supp. 379 (D. of C., 1970).

The OFCC has general responsibility for assuring compliance with Executive Order 11,246, although this responsibility has been delegated to compliance offices housed in the various contracting agencies. To maintain vigil over the construction industry, section 302(a) defines "construction" as "the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property." This broad definition of "construction" even reaches fencing and road maintenance.

Executive Order 11,246 and Title VI of the Civil Rights Act of 1964 cover much of the same ground; Title VI, curiously, only forbids discrimination on the basis "of race, color, national origin . . .," while Title VII and Executive Order 11,246 forbid sex discrimination as well as racial discrimination. Executive Order 11,411 forbids government contractors and subcontractors to engage in any age discrimination (not 40 to 65, as is specified in the federal law later reviewed), without requiring affirmative hiring.

While the meaning of affirmative hiring seems clear, deciding what constitutes satisfactory recruitment and a reasonable time to comply is speculative and confusing; it was apparent that specified goals and time tables were necessary. To establish uniformity is difficult because of geographic, industry, employer, union, transportation, training facilities, and other differences. The construction industry, radically affected by the supply of money, interest rate, hiring halls, apprentice training programs, geographical differences in income, and demand and supply, is a good example of the difficulty encountered when fixing fair employment goals.

It was apparent that the OFCC would have to designate different goals and timetables for different employers, industries, and locations; responsibility could not be fixed without such commitments. Employers were given deadlines to hire and promote a specific number of employees. The number specified and deadline is viewed as a goal rather than as a quota to avoid constitutional hassles and claims of reverse discrimination under Title VII.

In the Cleveland plan, a contractor's bid was rejected who failed to submit an affirmative action plan, claimed to be illegal by the plaintiff.[5] The court, holding that contractors could be required to submit an affirmative action program for government approval even though quotas are legally improper, found a proper exercise of executive authority. While section 703 (j) of the Civil Rights Act forbids reverse discrimination and the Constitution is supposedly color blind, striving to attain a goal is not the equivalent of reverse discrimination, according to the court.

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[4] U.S. v. Carpenters Union, 457 F. 2d 210 (CA 7, 1972), *cert. denied,* 409 U.S. 851 (1972).

[5] Weiner v. Cuyahoga Community College 19 Ohio 2nd 35, 249 N.E. 2d 907(1969), *cert. denied,* 369 U.S. 1004(1970).

In Philadelphia, builders were required to submit affirmative action plans before government contracts would be awarded. If the goals were deemed inadequate, low bidders were denied contracts until acceptable plans were submitted. The comptroller general refused to follow this procedure, reasoning that federal contracts must be awarded to the lowest bidders. However, even before the comptroller general objected, the OFCC in 1968 initiated a new affirmative action program in which goals and timetables were spelled out before bids were submitted. The new directive applied to only a few firms in the construction industry, covering employers with 50 or more permanent employees. The pre-bidding, goal-fixing approach was utilized because the goals submitted by employers were often inadequate.

Consequently, the Philadelphia Plan was modified in 1969, the OFCC setting high- and low-goal ranges for six of the construction trades. Contractors bidding stipulated that they would try to comply with these goals. Evidently, the goal ranges fixed by the OFCC are not constitutionally objectionable.[6] The Supreme Court has not considered the constitutionality of the goal ranges fixed by the OFCC, refusing to review appellate court decisions upholding them.[7]

It is frequently difficult to separate a goal from a quota. For example, if the quota range is narrow and the OFCC insists upon substantial compliance, the goal is not far removed from a mandatory quota. The time has come for the Supreme Court endorsement of the benign quota concept which, to date, is viewed as unconstitutional. Minimum and maximum goals in essence are no more than benign quotas and it is time to cast away the artful legal shadow-boxing that is being carried on in the name of fair play. If courts, when finding a violation of Title VII, can require unions to admit a specific number of black members or employers can be required to hire a fixed number of black employees, there is no logical reason to pussyfoot over affirmative action quotas and goals.[8] While a court ordered quota is made only after a finding of racial discrimination, the distinction seems insignificant if affirmative action and quotas are necessary. The courts and OFCC are neutral agents striving to eradicate present racial inequities and are not dealing with past practices. To date, appellate courts have upheld the decisions of trial courts requiring affirmative hiring when private employers are found guilty of employment discrimination.[9] Similar types of court orders have been approved where public employment is involved.[10] The quota by contract should be similarly evaluated.

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[6] Contractors Assn. of Eastern Penn. v. Sec. of Labor, 422 F. 2d 159 (CA 3, 1971), *cert. denied,* 404 U.S. 854(1971); Asbestos Workers v. Vogler, 407 F. 2d 1047 (CA 5, 1969); U.S. v. Elec. Workers Union, 428 F. 2d 144 (CA 5, 1970); *cert. denied,* 400 U.S. 943 (1970); *cert. denied,* 404 U.S. 984 (1971); So. Ill. Builders Assn. v. Ogilvie, 471 F. 2d 680 (CA 7, 1972).

[7] Also see *Carter v. Gallagher,* 3 FEP Cases 900 (CA 8, 1971); *Associated General Contractors v. Altshuler,* 6 FEP Cases 1013 (CA 1, 1973); *NAACP v. Allen,* 7 FEP Cases 873 (CA 5, 1974); *De Fumis v. Odegaard,* 416 U.S. 312 (1974).

[8] U.S. v. Plumbers Union, 4 FEP Cases 213 (D.C.S.N.Y., 1972); U.S. v. Steamfitters Union, 6 FEP Cases 319 (D.C.S.N.Y., 1973).

The Philadelphia Plan was again revised in 1971 to plug an apparent loophole, applying to all government projects in excess of $500,000. Prior to 1971, contractors holding government contracts could transfer workers from noncovered to covered projects to meet government assigned goals. Since 1971, the Philadelphia Plan requires that the employer's *total* work force in the area meet the percentage guidelines–it is not enough to meet established goals on the construction project subject to regulation.

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[9] Asbestos Workers v. Vogler, 1 FEP Cases 577 (CA 5, 1969); U.S. v. I.B.E.W., 2 FEP Cases 716 (CA 6, 1970); U.S. v. Ironworkers Union, 3 FEP Cases 496 (CA 9, 1971); U.S. v. N.L. Industries, 5 FEP Cases 823 (CA 8, 1973); Parham v. Southwestern Bell Tel. Co., 2 FEP Cases 1017 (CA 8, 1970).

[10] Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 5 FEP Cases 1344 (CA 2, 1973); Morrow v. Crisler, 7 FEP Cases 586 (CA 5, 1974); Western Addition Community Addition v. Alioto, 6 FEP Cases 1270 (D.C.N. Calif., 1973); NAACP v. Dothard, 7 FEP Cases 129 (D.C.M. Ala., 1974); Legal Aid Society v. Brennan, 8 FEP Cases 178 (D.C.N. Calif., 1974); State of Washington v. Baugh Const. Co., 313 F. Supp. 598 (W.D. Wash., 1969); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J., 1970).

Chapter VIII

STATE FAIR EMPLOYMENT LAWS

History

The *Civil Rights Cases* and *Plessy v. Ferguson* decisions, as indicated, were disastrous for blacks and others. Separate can never be equal because the dominant political and economic groups are actually claiming superiority. In terms of physical and other facilities, it is possible, given the will, to provide the same schoolrooms, books, and near-equal teachers for blacks and whites. In actual practice, there was never any intention to equalize facilities and opportunities in the classroom. As previously indicated, an important factor ignored by the Supreme Court was the need to motivate those exposed to learning if equality were to be achieved. Unfortunately, few in our society acquire knowledge and skill because of a love of learning; rather, most people, anticipating economic reward in the future, are motivated in the classroom. Black and white children require motivation; when the ultimate goal, success in the marketplace, is denied, interest in academic achievement wanes, condemning the bulk of these children to the most undesirable jobs.

A particularly unfortunate aspect of the *Civil Rights Cases* was manifested after unions attained power in the United States. If church leaders and employers could discriminate morally and legally, unions could not be required to respond any differently. When the *Civil Rights Cases* decision was enunciated, unions, for the most part, were of little importance, exercising little control over the total supply of labor. With the Wagner Act, unions controlled many facets of employment and discrimination followed the already established marketplace patterns. By operating hiring halls and negotiating seniority clauses and arbitration clauses, the disadvantaged faced discrimination from yet another source. It seems reasonable to assume that this added burden did nothing to stimulate black interest in the classroom.

Of the three major groups influencing employment, employers and unions could discriminate without legal responsibility. Only government agencies were constitutionally required to hire and promote on a fair basis, in practice meaningless protection. As the educational level required is raised, the disadvantaged often fail to qualify for government jobs. To push fair employment via the Fifth and Fourteenth Amendment guarantees was not an optimum situation in the public or private sectors.

The 1930 depression forced legislators, economists, jurists, and others to rethink goals, methodologies, and the roles government should play in an industrial society. And changes are most easily initiated during an economic catastrophe or war. The 1930 depression forced some changes while World War II led to others. The depression called attention to legislative and judicial inadequacies, including past constitutional interpretation, the courts being the dumping ground for all problems. Economic theorists and legal practitioners serve the living, and worshippers of the past too often fail to recognize that past values and solutions are no longer adequate, given the many and rapid changes. Classical theory was overhauled to deal with the 1930 economic catastrophe and it was imperative that the legal changes match the shifts in economic policy. Laissez faire and old-fashioned court neutrality were not supportable if the economic well-being of minorities were to be improved.

Laws and courts are often ill-equipped to cope with the difficult and specialized problems constantly arising. Employer-union, investment, corporate concentration, and individual needs require the attention of specialists and not the all-purpose trial judge. The generalist in any occupation is to be applauded, but his usefulness is often limited in a highly specialized society. Furthermore, judges abiding by the hearsay rules of evidence made it difficult for plaintiffs to establish wrongdoing, bearing the burden of proof. While the public is docile when unemployment is inconsequential and peace prevails, displeasure mounts rapidly and openly, threatening to government officials when recession and war materialize. The 1930s ushered in an era of administrative manipulation, permitting regulation by experts and deviations from the rules of evidence used in the courtroom. Agencies like the NLRB and the Securities Exchange Commission investigated and adjudicated complaints in a quasi-legal fashion, subject to appellate review. The era of considerable legal specialization had begun.

Following Keynesian economic theory, the federal government initiated various programs to pump money into the hands of consumers and provide jobs. When government assumes responsibility for maintaining purchasing power, providing employment, and encouraging investment, the meaning of state action under the Fifth and Fourteenth Amendments takes on new dimensions. To a lesser extent, state governments, providing worker's and unemployment compensation benefits, were also pumping money into the hands of fast spenders. When minorities are hard hit by the depression and compose 11 percent of the total population, the government ultimately must review past policies of neglect, called laissez faire and neutrality. Typically, the unemployment rate among people facing discrimination is twice that of others. If government assumes responsibility for those without adequate income, ways must be found of controlling and eliminating racial discrimination. While Keynes did not concern himself with racial and religious discrimination, his theory requires a hard look at unemployment and underemployment and its causes. Blacks and others were typically unemployed and underemployed.

Little attention was paid to minorities before World War II. During World War II, militancy and data gathered forced some rethinking and changes, however slight. In addition, the Nazi holocaust drew attention to religious discrimination in Europe and racial and religious discrimination in the United States. Because discrimination was everywhere and firms and unions controlled interstate commerce, federal legislation, and not just the use of executive power, was necessary. The Wagner and Sherman Antitrust Acts already controlled unions and firms operating in interstate commerce, and federal fair employment legislation would entail a similar type of regulation. However, many of the important congressional committees were controlled by southern representatives, and the lack of fair representation for urban dwellers where minorities concentrated[1] prevented the enactment of federal legislation.

New York, with a liberal electorate and sizable minority population, was the first state to enact a fair employment law, utilizing the administrative technique polished by the federal government during the 1930s and 1940s. The New York law, like other state laws passed subsequently, originally outlawed racial and religious discrimination (later, sex, age, and health discrimination were also prohibited).

The legislative history of the New York law is interesting, an experience undoubtedly shared by other states enacting fair employment legislation. Prior to the passage of the Ives-Quinn fair employment law in 1945, a New York committee was assigned responsibility for minimizing discrimination in employment; the committee could not make an enforceable decision as it was only empowered to conciliate. Recognizing the limitations of such an approach, the 1945 legislation provided for conciliation and, in addition, authorized the state commission to make decisions which could be enforced by court order if necessary. The states enacting fair employment legislation, following the New York lead, placed primary emphasis upon conciliation as best suited to promote fair employment; binding decisions by state commissions and court enforcement followed if conciliation is unsuccessful.

By 1964, the year that the federal fair employment law was passed, 26 states passed laws similar to the New York legislation. As of 1974, 40 states had enacted fair employment legislation. In addition, Florida, North Carolina, and Texas passed legislation prohibiting discrimination in public employment. Only Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, North Dakota, South Carolina, Tennessee, Texas, and Virginia have not enacted fair employment legislation aimed at private industry and unions. North Dakota is the only northern state without fair employment legislation.

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[1] Colgrove v. Green, 328 U.S. 549 (1946).

The reasons presented against passing fair employment legislation are rather uniform, first advanced in New York, and refined and added to when other states considered similar legislation. The arguments most frequently cited were:

1. An unconstitutional deprivation of freedom of contract for employers, seriously interfering with freedom in the marketplace. This nineteenth century Smithian rationale was advanced by members of the New York Bar Association prior to the passage of the New York law, geared to old line constitutional theory that business men were entitled to negotiate employment contracts free of state interference. But the Wagner Act had already placed some limitations on the employer's ability to contract and fix terms of employment. A state fair employment law is another limitation imposed upon employer freedom, protecting large groups of people who cannot freely market their labor because of racial prejudice. In this sense, state fair employment legislation is similar to the Wagner Act protecting union sympathizers contending with employer discrimination. The freedom of contract objection raised by the New York State Bar Association had already lost much of its validity when the New York law was debated.
2. Industry, unwilling to brook interference, would leave New York for states without fair employment legislation. Such rationale supports the notion that racial prejudice is so deeply rooted that industrial decision-makers operating profitable firms would close doors to escape fair employment legislation. That many industries, like banking, insurance, and others, could not leave New York because of "principle" was not mentioned. It seems reasonable to assume that few employers would close their doors merely to escape regulation, however onerous. Such thinking, if nothing else, points to a need for fair employment legislation. Federal contractors since 1942 were required to stipulate that hiring would be conducted on a fair basis, which did not stop future quests for government business. Furthermore, if other states and the federal government required fair employment, where could business run?
3. Morality cannot be legislated; the large number of religious taboos ignored, many of them moral in tone, is proof of this conclusion. This position does not deny the need for fair employment legislation, its advocates merely pointing to the difficulty of enforcement. Antitrust legislation is also difficult to enforce—in fact, the concentration of industry

in few hands is testimony to the difficulties faced—but few would seek repeal of the Sherman Act. Fair employment legislation is difficult but not impossible to enforce; with concentrated effort, employment opportunities for minorities can be improved considerably even in firms and unions operated by hard-core discriminators. Some decision-makers live and operate in an atmosphere where discrimination is commonplace, and government prodding can quickly lead to change where discrimination is not intentional. Because of those practicing discrimination intentionally, the government task of promoting fair employment is made more difficult but not impossible.

4. Fair employment legislation increases racial tension, unquestionably a white point of view. Racial hostility was commonplace long before fair employment legislation was considered, to a degree unsuspected by some white people. Like the busing of school children, hostility is more apparent when fair employment is pushed, but discrimination was present long before the cure was attempted. While the black remained in the rural South, the white city dweller did not constantly face the swelling black hatred and overt displays of ill-will. While tension could become more strained, a short-run possibility if fair employment legislation were enacted, abatement was possible in the long run. Besides, this argument ignores the moral issue, fair play for minorities.
5. Staunch followers of individualism, the Ayn Rand cult and laissez faire-school economists, reason that discrimination, while ugly, has social value, forcing minorities to improve, ultimately gaining acceptability in the marketplace. Poor white immigrants from Europe managed to succeed economically and, presumably, an added incentive, a will to improve, was instrumental in their success. Why some people must face discrimination in order to succeed and not others is not clear. That self-improvement does not assure success if discrimination is widespread is ignored by the freedom of the marketplace advocates. After all, the Ayn Rand hero was the hard-working and talented white. While some facing economic discrimination may tenaciously dig in to succeed, many lose incentive, accepting defeat bitterly.
6. Employers did not relish another round of regulation considered to be onerous, concerned with the added paperwork, the inevitable legal battles, inspections, etc. While government regulation can be onerous, legislation is justified if necessary. In addition, freedom for employers and unions had only compounded the problems faced by minorities.

The State Laws

There is a common thread to most of the state fair employment laws in spite of differences. A complaint must be made by the aggrieved or his representative to the state administrative agency; in some states, like New York and Iowa, investigations can be conducted without the submission of complaints. An investigation is then undertaken, and if the charge is unfounded, the matter is dropped without the right of court review (New York permits court review). If the investigation uncovers evidence supporting the charge, the accused employer, union, or employment agency is permitted to justify its action during the conciliation hearing. Because education is of the utmost importance, giving the accused an opportunity to rectify the wrong, conciliation was legislatively provided for before a final decision could be made by a state commission. A subsequent hearing and binding decision became a last resort effort. Most complaints are settled at the conciliatory stage, and few require a hearing and formal decision by state commissions or courts. For this reason, little is known publicly about what is accomplished by state commissions, especially since publicity is forbidden during the conciliatory stage. The state commissions, generally, are not required to follow courtroom rules of evidence, following typical administrative procedure. Illinois is an exception, requiring its state commission to follow the hearsay rules of evidence at the formal hearing.

Should the accused fail to comply with the decision made at the hearing, the commission can seek enforcement. If the accused is dissatisfied with the decision, he can seek court review. In many states, the court reviews the commission decision without holding another hearing to determine if there are improprieties. But in some states, Iowa is one, the accused challenging a decision is entitled to a full hearing, a trial *de novo*, as though the commission had not made a prior decision. A second full-blown hearing in court seems wasteful—after all a quasi-legal hearing has already been conducted by the state commission. However, some justify this dual hearing procedure because commissions serve as prosecutors, judges, and juries, an unfair situation, and justice is better served if the technical rules of evidence are observed in the courtroom. Yet, the latter rationale is less than satisfactory because evidence unacceptable in a courtroom many years ago is acceptable today. For example, statistical data, showing that a substantial number of black people fail tests, as in the *Duke Power Co.* case later reviewed, is acceptable evidence of a violation of Title VII even though intentional discrimination is not established. In addition, the burden of proving innocence of the charge is often shifted to employers.

Prejudice is complex and irrational, difficult to prove and measure. Prejudiced individuals may sometimes react favorably toward minorities, while people relatively free of bias have reacted in a discriminatory fashion. It should be stated that black people also harbor and display the same attitudes. The problem of proving discrimination, intentional or otherwise, can present a formidable task if commissions or courts follow the technical rules of evidence.[2]

People nursing a strong hatred cannot be reached by the educational aspects and conciliation procedures of a fair employment law; here, the most effective approach may be the invocation of a meaningful penalty. Employers and unions accuse each other of discrimination, sometimes not realizing that they are equally responsible. For example, unions claim that they are not motivated by prejudice when they seek to protect the jobs of members via seniority clauses, hiring halls, etc. At the same time, some employers are reluctant to hire blacks, fearing damage to employee morale and production. Holding employers and unions responsible for discrimination can be difficult under these circumstances unless statistical evidence is permitted to establish violations.

Also adding to the difficulty of establishing discrimination is the lack of sufficient funds or a failure on the part of commissions to make full use of delegated powers. If education and conciliation are most often relied upon, commissions may be reluctant to lash out at discriminators. While progress has been made toward fair employment, startling changes have not taken place since the enactment of fair employment legislation. Conciliation does not lead to rapid change unless commissions face up to the fact that meaningful changes will not take place without coercion. A proper question is whether legislators really believe that education and conciliation are the best approach or whether they are protecting potential offenders. Are wrongdoers unnecessarily protected by legislatively pushing conciliation rather than requiring an immediate hearing? The yearly reports prepared by the state commissions indicate considerable success in ending discrimination via conciliation, but there is considerable distance between what is claimed and the composite employment statistics.

The legislative goal of promoting fair employment for blacks and others has been played down by assigning additional responsibilities to state commissions without providing adequate funding and personnel. The state commissions were originally created to eliminate racial and religious discrimination; today, the same commissions are often required to settle sex, age, health, and housing discrimination complaints without corrsponding budget increases to match additional responsibilities.

The name of the game today, whether it be affirmative hiring or simply promoting fair employment, is the gathering of statistical data. If not hired or restricted to menial jobs, statistics convincingly establish patterns of intentional or unintentional discrimination in the large urban centers where minorities concentrate. Accomplishing what is tantamount to affirmative action, commissions and courts finding discrimination can order the hiring, promotion, referral, and admission to union membership of the disadvantaged. A limitation of the typical commission decision is that only the complainant or complainants, unless a class action is brought, are helped; others continue to face discrimination. To crack the white stranglehold on jobs and opportunities, large numbers of potentially capable disadvantaged jobseekers must be helped. An order or contract favoring the employment of many people expedites the call for fair employment. Whether state commissions and courts are effectively exercising their remedial powers to provide mass openings where statistical data supports the hiring of large numbers is doubtful.

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[2] Motorola, Inc. v. Ill. FEPC, 215 N.E. 2d 286 (1966).

Like the federal EEOC, some state commissions, Iowa is one, can initiate investigations without the submission of a complaint. Unlike the complaint settled during conciliation, investigations can be publicized, a powerful force to end discrimination when properly utilized. The commissions authorized to conduct investigations have not used this tool effectively. Some commission members are of the opinion that the light touch, rather than aggressive manipulation, accomplishes more in the long run to help the disadvantaged. Due to insufficient personnel, inadequate funding, and large number of complaints, state commissions infrequently initiate investigations. Investigations serve a useful purpose and should be initiated by commissions more frequently. The federal and state laws requiring confidentiality until a formal hearing is held protect the innocent from damaging accusations. An investigation properly conducted can spotlight the innocence or guilt of the industry, firm, or union.

Chapter IX

FEDERAL FAIR EMPLOYMENT LEGISLATION

History

Many attempts were made in Congress to enact a federal law prohibiting racial and religious discrimination in employment before Title VII was enacted in 1964. In 1942, the House of Representatives considered establishing an administrative agency similar to the NLRB, recognizing that discrimination was national in scope. Similar measures were introduced in 1944 and 1945, spurred by black militancy and additional evidence gathered establishing widespread discrimination. Because of the congressional failure to enact fair employment legislation until 1964, the executive orders, Fifth, Thirteenth, and Fourteenth Amendments, and the Railway Labor and Taft-Hartley Acts were remedies turned to by those seeking help.

President Kennedy (and others) initially felt that a fair employment law was unnecessary because the executive orders barred discrimination. Others reasoned that complete equality was an evolutionary process which, like prohibition, could not be legislated. Some took a states' rights stand, fearing the further growth of federal power and the erosion of local power. To many, the key factor was education and industrial training, not a law with teeth. Employers objected to more regulation and paperwork. A few union leaders argued that the United States Constitution guarantees freedom of association, and "undesirables," whether white or black, should not be forced upon them. It was also claimed that fair employment legislation would damage rather than aid minorities, hardening white resentment.

Those favoring a federal fair employment law advanced the following rationale in support:

1. Widespread discrimination by employers and unions.
2. States' rights advocates promote local rule to prevent fair play; the concept was never intended to perpetuate immoral or illegal practices.
3. The executive orders and the federal legislation indirectly hitting at employment discrimination were inadequate.
4. Keynesian rationale required government involvement to promote full employment, a goal retarded by racial hostility.
5. Large firms and unions operating in interstate commerce require federal regulation.

Current Regulation

In a climate requiring considerable compromise, the Civil Rights Act was passed in 1964. A five-member board, the Equal Employment Opportunity Commission (EEOC) was created, empowered to conciliate but not authorized to make a binding decision enforceable by court order. Procedurally, a complaint can be made against employers, unions, and employment agencies to the EEOC which then investigates. The EEOC can also initiate investigations without receiving a complaint when undertaking "technical studies . . . to effectuate the purposes and policies of this title. . . ."[1] If the investigation supports the complaint, conciliation is attempted by the EEOC; if successful, the charge is dropped without publicity. However, if the accused refuses to follow the EEOC suggestions, either the EEOC or the complainant can sue in a federal district court. In addition, the complainant can sue if dissatisfied with the agreement reached between the EEOC and the accused. If the EEOC dismisses a complaint for lack of evidence or 180 days expire without an acceptable settlement, the EEOC is required to notify the complainant who can sue within 90 days after notification. In no event can a court suit be brought without first complaining to the EEOC. The 1972 legislation limits back pay awards to no more than two years. In 1975, the Supreme Court ruled that the complainant is entitled to back pay even when the defendant does not engage in intentional discrimination.[2]

In the absence of state fair employment legislation, the complaint must be brought to the EEOC within 180 days after the charged violation occurs (unless there is a continuing violation). Within ten days after receiving the complaint, the EEOC must notify the respondent. If there is a state law in effect where the alleged violation occurs, the complainant also has 180 days to complain to the EEOC. If the initial complaint is made to a state or local agency, the complainant has 300 days to notify the EEOC of the unfair practice. The EEOC allots 60 days after state or local proceedings have been commenced before it will intervene.[3]

Some basic changes made in the 1964 legislation by the 1972 amendments are:

1. State and local government employees are covered. In addition, while not under the jurisdiction of the EEOC, federal employees can sue under Title VII in a federal district court after the United States Civil Service Commission has an opportunity to rectify the wrong.
2. All employers, unions, and employment agencies in interstate com-

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[1] Sec. 705 (g)(5).

[2] Albemarle Paper Co. v. Moody, 10 FEP Cases 1181.

[3] Love v. Pullman, 4 FEP Cases 150 (Supreme Court, 1972).

merce with 15 or more employees are covered. Under the 1964 legislation, public employment agencies were excluded from coverage; since 1972 the United States Employment Service or any other public agency "regularly undertaking with or without compensation to procure employees" is covered. Note that the private employment agency is deemed to be in interstate commerce by serving employers subject to federal regulation. Unions operating a hiring hall can also be treated as a private employment agency.

3. The EEOC can bring suit in a federal district court when conciliation is unsuccessful. Prior to 1972, the attorney general, and not the EEOC, could sue. In addition, the EEOC can request injunctive relief where there is a "pattern or practice of resistance."
4. Employees of private educational institutions are protected, except that religiously operated schools can legally discriminate on the basis of religion (but not race, sex, or national origin).
5. The 1964 legislation exempted religious corporations and associations, and the 1972 amendment added thereto by excluding all activities, even those that are not religious, from coverage. However, the 1972 exemption only permits religious discrimination—discrimination on the basis of race, color, sex, or national origin remains prohibited.
6. To accommodate differences in religious practices, employers are required to permit differences in the observance of the sabbath day, religious holidays, etc., unless unduly difficult for the firm.[4] Employers, in the absence of hardship, are also required to accommodate religious preferences for dress and appearance.
7. Created the office of General Counsel.

Title VII broadly prohibits all discriminatory acts unless a bona fide occupational qualification (BFOQ) is established or exempted from coverage by the act. Theoretically, the EEOC, based on congressional will, feels that BFOQs are seldom justified and the employer must produce evidence establishing entitlement. It should be apparent that BFOQs are not authorized to permit racial or color discrimination. BFOQs are approved when "reasonably necessary to the operation" of the business.[5] Employers must recruit fairly, permitting equal opportunity without segregation. However, it is not discriminatory for an employer to differentiate on the basis of ability and bona fide seniority and merit systems. Unions cannot discriminate when admitting members or engage in segregation and unfair collective bargaining. Title VII does not require affirmative hiring or promotion, only fair employment (however, it is sometimes difficult to draw the line between fair employment and affirmative hiring). Section 703(j) expressly forbids reverse discrimination while affirmative hiring, if not reverse discrimination, comes close to it.

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[4] Riley v. Bendix Corp., 4 FEP Cases 951 (CA 5, 1972); Reid v. Memphis Pub. Co., 5 FEP Cases 69 (CA 6, 1972); Drum v. Ware, 7 FEP Cases 269 (USDC, WNC, 1974); Johnson v. U.S., 8 FEP Cases 371 (CA 5, 1974).

[5] BFOQs will be more fully explored when sex discrimination is later reviewed.

The balance of this chapter is devoted to problems of considerable importance that have arisen under Title VII.

Testing

A decision made by the Supreme Court, *Griggs v. Duke Power Co.*,[6] concerning the use of tests, is unquestionably one of the most important made by the so-called Burger court, its potential reach not yet fully realized.

The harlequinesque *Motorola*[7] decision, arising under the Illinois fair employment law, received widespread newspaper publicity, causing considerable unrest in Congress debating the merits of Title VII. Motorola tested the black complainant who supposedly failed. When employment was refused, a complaint was made to the Illinois Commission and the hearing examiner found evidence of discrimination. While the commission decision was reversed by the Illinois Supreme Court after the enactment of Title VII, prior thereto the newspapers played up the opinion of the hearing examiner. Not only was evidence of discrimination uncovered, but the hearing examiner took the position that all tests discriminate against the underpriviledged, a conclusion that was not favorably viewed in the newspapers. To support the finding of intentional discrimination, the examiner mentioned that Motorola could not or would not produce the test completed by the complainant and that he passed the same test when orally administered by the examiner. It was perhaps unfortunate that testing generally was made an issue at this time, unnecessary because of the conclusion that there was intentional discrimination. If all commissions and courts accepted the conclusion of the Illinois examiner, employment testing would have to be outlawed. It was this point that aroused adverse comment in the newspapers.

Other problems revolve about the use of tests that could hinder the effective enforcement of fair employment legislation. Proving intentional discrimination would be difficult if all tests were prima facie acceptable. The problem of proof would be particularly difficult in states like Illinois where the hearing examiners are required to follow the hearsay rules of evidence. Furthermore, many educators were critical of the indiscriminate use of tests. For employers with a taste for discrimination, testing could be a natural cover, lifting onus from their backs, particularly when encouraged by those seeking "scientific" selection and placement. Educators and employers are interested in limiting bias and selecting the most capable employees. Yet, if tests are indiscriminately resorted to, the problem is not intentional but unintentional discrimination. Considerable evidence is available that those facing employment discrimination perform less satisfactorily on tests than others, a factor which could limit fair employment and promotion.

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[6] 401 U.S. 424 (1971). Parts of this decision are reprinted at the end of the textual material.

[7] Motorola, Inc. v. Illinois FEPC, 34 Ill. 2d 266, 215 N.E.2d 286 (1966).

There are many aspects requiring careful attention when considering whether a test is discriminatorily administered or "scientifically" developed. Among these factors are:

1. Physical conditions at time of examination, i.e., is the room extremely cold or warm, noisy, etc.
2. Reliance upon other selective techniques, like references and interviews. After all, not even the strongest supporters claim that testing is infallible.
3. Background of those tested. For example, foreign born students seeking entrance to American universities score lower on admission tests than native born students. This differential may not be indicative of educational capability; rather, it could signify cultural differences and unfamiliarity with American jargon. Because of segregation and inferior schooling, minorities born and raised in the United States are exposed, at least to some extent, to a "foreign" culture and share problems similar to foreign born students.
4. The will to succeed on a job, motivation, is an important factor in job performance, a factor not measured by aptitude and intelligence tests.
5. Drawing a line between a passing and failing test score is an arbitrary decision and determining the dividing line is difficult. The cut-off scores chosen by employers often reflect the supply and demand for labor rather than the ability to perform satisfactorily.

Considerable attention continues to be focused upon testing under Title VII. Section 703 (h) provides:

> (N)or shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate. . . .

While debating the passage of Title VII, Senators Dirksen, Illinois, and Tower, Texas, expressed concern, after hearing examiners' decision in *Motorola*, that employers could lose the right to test. Based upon the congressional record, it does not seem that section 703 (h) was enacted to protect minorities; rather, the purpose was to protect employers using tests as a selective tool. In some ways, the broad protection for employers using tests, as signified in section 703 (h), conflicts with the general policy expressed in Title VII, the elimination of employment discrimination. It seems that section 703 (h) was incorporated into Title VII as a concession to congressmen reluctant to support fair employment legislation.

After the passage of Title VII, the EEOC promulgated guidelines requiring employers to gear tests to job specifications and description, requiring, in addition, validation and periodic checks for reliability. If these basic guidelines, suggested by psychologists and educators, are not followed, discrimination, intentional or unintentional, is inevitable. Under the EEOC regulations, employers would be required to authenticate all tests, something which few employers bothered to do, relying upon "store bought" tests. Many employers buy well-known standardized tests that are not geared to a specific job description, raising the question of whether tests accurately weed out desirable from undesirable employees and discriminate against minorities in the process.

The relationship between the EEOC guidelines, geared to the concept of "professionally developed" as specified in section 703 (h), and the background of people taking the test is not clear. Technically, employers failing to validate and check for reliability are hard pressed to prove that they use "professionally developed" tests. Are differences in background and education of job applicants something that employers should be held responsible for? This basic question could be answered in the negative if section 703 (h) is viewed as only prohibiting intentional discrimination. While educators and courts generally recognize differences in levels of educational attainment between white and nonwhite students, responsibility for poor performance on tests rests on many shoulders, including blacks. Blacks, Mexican-Americans, and others have been educationally short-changed, and rapid correction is essential if fair employment is to become a reality; the black and Spanish-speaking communities rightfully point to unequal schooling. Yet, probably more important than equal facilities and quality teaching is student motivation. If properly motivated, the quality of education would improve immeasurably in spite of unequal facilities and poor teachers (admittedly, these factors do have a negative effect on learning). Even if facilities and teachers are equalized, students disinterested in education cannot be uplifted. This suggests that greater attention must be focused upon families and neighborhoods, where motivation can be uplifted or retarded. While facilities and good teachers are helpful, fighting the negative pull of peers and family limits student motivation and educational success.

Given this background, the significance of *Griggs v. Duke Power Co.* can be better appreciated. Prior to 1964, the defendant, a public utility, openly discriminated against black employees, relegating them to the Labor Department housing the unskilled and lowest paying jobs. While white employees in this department were permitted to transfer to other departments, blacks could not. After Title VII was enacted, the defendant ended all discrimination in hiring and promotion. However, to transfer to the four departments formerly restricted to white employees, black employees hired before 1964 had to graduate from high school or pass the Wonderlic Personnel Test, a general intelligence test, and the Bennett Mechanical Aptitude test. Black employees unable to meet either criterion claimed a violation of Title VII. According to the Supreme Court, the issue was "whether an employer is prohibited by the Civil Rights Act . . . from requiring a high school education or passing of a standardized general intelligence test as a condition of employment . . . when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees. . . ."

The Supreme Court, in deciding that Title VII was violated, found that:

1. There was no evidence of intentional discrimination.
2. Blacks were less likely to hold a high school degree than whites.
3. Because of an inferior education, blacks in North Carolina did not score as high as whites on general intelligence tests.
4. The Wonderlic and Bennett tests were not geared to job description and the ability to learn specific jobs. To be hired or transferred, scores above the "national median for high school graduates" were required, which would eliminate many blacks with an inferior education. In a footnote, the court noted that the professional expertise of persons preparing tests is not enough, and that the EEOC guidelines must be followed.

The Supreme Court decision in *Duke Power Co.* is important for the following reasons:

1. Employers were required to remove arbitrary and unnecessary barriers impeding black progress. Thus, high school diplomas and passing test scores are unnecessary barriers when employees before 1965 had successfully filled better jobs without these requirements.
2. Congress intended to outlaw intentional and unintentional discrimination. What is important under Title VII is the effect of an employment practice; if the procedure or policy excludes blacks without business justification, there is a violation. While section 703 (h) authorizes "professionally developed ability test(s)" not "designed" or "intended" to discriminate, tests are not authorized when unrelated to the job. Because it is not necessary to establish intentional discrimination, the burden of proving a violation of Title VII has been lightened. The plaintiff establishes a violation by showing that testing has a negative effect on blacks, after which the burden shifts to the employer to discredit the allegation or produce evidence of "business necessity."

An exception is permitted if the employer establishes "business necessity." However, the employer must establish "business necessity," which was not defined by the Supreme Court. Had the employer presented evidence that a high school diploma and successful completion of the tests were necessary for promotion as claimed, an exception might be in order.

3. The EEOC properly exercised its authority by requiring tests geared to job description, validation, and periodic checks for reliability. The Supreme Court, contrary to the hearing examiner in *Motorola*, did not claim that all tests were inherently discriminatory; instead, the court took the position that many tests do not serve a useful purpose or predict success, noting that "(h)istory is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress had mandated the commonsense proposition that they are not to become masters of reality." Whether Congress "had mandated" this conclusion is at least somewhat speculative in spite of the congressional record relied upon by the Supreme Court to support its conclusion.

There are unresolved questions emanating from the *Duke Power Co.* decision. The Supreme Court stated that "(n)othing . . . precludes the use of testing. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." Because of differences, to "measure the person for the job" could mean that different tests would have to be developed for blacks, whites, Mexican-Americans, Indians, etc.; the EEOC guidelines currently point to this possibility. In *Duke Power*, the employees required to take tests before seeking transfer had been employed in the Labor Department for some time and their past performance is as reliable as a test to forecast ability to handle another job. Tests are frequently unnecessarily resorted to by employers to forecast job performance for many employees seeking promotion, particularly older employees with less education.

Based upon *Duke Power*, statistics can be relied upon as prima facie evidence of a violation, however unintentional. In terms of evidentiary procedure, the problems are numerous. The statistical analysis employed in Title VII cases is either comparative or demographic. Where comparative analysis is undertaken, the plaintiff produces statistics showing the number of blacks and whites taking the test who fail and pass, thereby establishing comparative disadvantage. Such a procedure is statistically defensible. When demographic analysis is resorted to, the composition of the work force, i.e., the number of black and white employees, is compared to the general population in the geographic area where the employer is located. If the percentage of black employees is less than the percentage of black residents in the area, the tests are presumptively discriminatory. This raises an important question in light of *Duke Power Co.*—how to measure the disproportionate effect of testing (or other company policies). Statistically significant is the question of the number of minority employees effected as well as the use of local, statewide, regional, or national data. Basically, the question is one of fixing the relevant job market. Since most employers recruit locally rather than nationally, national or other wide-area statistical information may be irrelevant.

If a firm is located in a suburb far from the area where blacks concentrate in the city, should the demographic area include the city as well as suburb when few blacks apply for employment? Here, demographic statistical evidence constitutes less satisfactory evidence of a violation than comparative analysis. If employers operate factories in suburbs rather than inner cities, there is a likelihood that fewer blacks, proportionately, will seek employment than reside in the metropolitan urban area. There has been a significant migration of industry from city centers to the outlying regions, unquestionably affecting black employment opportunities. For some types of employment, like policemen, few blacks are interested. Or if employers seek engineers or mathematicians, few blacks, percentagewise, are qualified. Yet, in many instances, demographic statistics point to potential discrimination by employers who employ few blacks. While comparative statistics are more reliable to establish discrimination than demographic statistics, the latter approach cannot be ignored. But some judges are reluctant to accept any statistical evidence in spite of the Supreme Court decision in *Duke Power Co.*[8]

One of the most difficult problems arising under *Duke Power Co.* is the Supreme Court requirement that tests measure potential performance on the job. The EEOC regulations mention three ways to validate tests:

1. Construct validity—personal characteristics essential for successful performance on the job. An example would be the emotional stability of firemen and policemen.
2. Content validity—does the test measure the skills to be used on the job. This refers to performance tests like the number of words typed per minute.
3. Criterion related validity—a study to determine if those performing satisfactorily on a test perform equally well on the job. In addition, those who do poorly on a test are investigated to see how well they perform on the job; if performing poorly on the job, the test is valid.

In terms of employment reality, validation of personal characteristics by construct validity is extremely difficult and the EEOC requires follow-up studies to establish correlation between the test and job performance.[9] Even measuring performance on the job is difficult—should a supervisor's rating establish efficiency or is something more necessary?

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[8] Marquez v. Omaha District Sales Office, 440 F.2d 1157 (CA 8, 1971); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah, 1971); Rowe v. General Motors Corp., 457 F.2d 348 (CA 5, 1972).

The question of test validation was again considered by the Supreme Court in *Albemarle Paper Co. v. Moody*.[10] The firm hired an expert to determine whether its testing program was job-related, as required in *Duke Power Co.* The expert decided that the program was legitimate under Title VII because the test scores and the merit ratings made by supervisors corresponded. However, the firm did not undertake an investigation as to whether the tests were job-related. The Supreme Court turned to the EEOC guidelines, deciding that the criterion enunciated to validate tests for job-relatedness should be followed. The Supreme Court found the expert's method improper because "(t)here is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria—or whether . . . any of the supervisors actually applied a focused and stable body of criteria of any kind. There is . . . no way to determine whether the criteria *actually* considered were sufficiently related to . . . job-specific ability to justify a testing system with a racially discriminatory impact."

In addition, the Supreme Court found the test defective because the study "focused . . . on job groups near the top of the various lines of progression." Those studied were white experienced workers while the tests were given to the young, inexperienced, and, often, nonwhite. In addition, even if the tests are proven to be job-related, minorities can establish a violation by showing that other selective devices can be used to establish efficiency which do not have a negative impact upon them. This seems to mean that the Supreme Court approves of the EEOC guidelines calling for separate validation for black and white workers where feasible. Here the employer did not submit evidence that separate validation for the lower level jobs was not feasible.

The Supreme Court, following EEOC guidelines, views negatively tests that are not properly validated once a deleterious impact upon minorities is established. *Duke Power Co.* and *Albemarle Paper Co.* support this view. It seems proper to conclude that the Supreme Court will not tolerate much, if any, deviation from the EEOC testing guidelines.

Neither section 703 (h) nor *Duke Power Co.* mention psychological and personality tests, even those necessary for successful job performance. Whether the same standards of evaluating psychological and personality tests should be used as for ability and aptitude tests is, consequently, speculative. The EEOC regulations provide that "(t)he term 'test' includes all formal scored . . . techniques of assessing job suitability, including . . . specific qualifying or disqualifying personal history or background. . . ." Consequently, psychological and personality tests can be job-related. For example, an outgoing personality is probably necessary for sales work, and a test could assess potential success on the job. Yet, there are few jobs in industry where a certain type of personality is necessary to achieve success. Employers often have a model employee in mind meeting the "establishment" image, and seek employees who meet that image. Those seeking social and economic changes, like blacks raised in ghettos, seldom match personality models conceptualized by employers. Under these circumstances, personality tests should be monitored closely, inevitably having a negative effect on fair employment. In fact, personality testing is suspicious when employees already on the job are considered for advancement, their "personality" already demonstrated.

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[9] Douglas v. Hampton, 10 FEP Cases 91 (CA, D.C., 1975).

[10] 10 FEB Cases 1181 (1975). This case has been reprinted in part.

It is difficult to justify psychological and personality testing for the following reasons:[11]

1. While such tests are a valuable tool for medical diagnosis, they do not demonstrate success on the job.
2. Determining the personality traits needed on the job is difficult.
3. Getting responses accurately measuring the thinking of those tested is difficult.
4. Few if any psychological and personality tests can be validated.

Seniority

Seniority geared to age has been an important factor in ancient and modern civilizations, establishing leadership roles in families, religious organizations, and the military. Age was often considered a sign of experience and wisdom. To this day, leadership roles in religious organizations and the military are somewhat geared to age and years of service, an informal seniority system. Under the system of primogeniture developed in England, the eldest male child inherited the family property. It was only natural that a similar system develop in industry after the Industrial Revolution. In both public and private employment, seniority today is important for promotion, furlough, recall, choice of shift, etc. Prior to the Wagner Act of 1935, seniority was a means of protecting union members from the anti-union animus of employers. However, unlike the system of primogeniture developed in England after the Norman Conquest, seniority in employment is not a legal right but one determined by agreement between employer and union, enforced by court order or an arbitration award if necessary.

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[11] U.S. v. Jacksonville Terminal Co., 3 FEP Cases 862 (CA 5, 1971); EEOC Decisions No. 72-0993, 71-797.

After the growth of union power and collective bargaining, employers, required to bargain in good faith over wages, hours, and working conditions, agreed to seniority clauses. Each contract, consequently, must be analyzed to ascertain the reach of the seniority clause. While the great bulk of the collective bargaining agreements contains a seniority clause, contracts differ considerably. In keeping with public policy promoting arbitration, as provided for in collective bargaining agreements, many seniority disputes have been adjudicated by arbitrators. There is little question but that union members and leaders consider seniority a contractual right of the utmost importance.

Unfortunately, public policy favoring union growth and collective bargaining came before public policy was developed protecting civil and minority rights. Many agreements were negotiated favoring white male seniority at a time when racial and sex discrimination were legal. After racial and sex discrimination were outlawed, questions abounded concerning the years of seniority accumulated by white male employees prior to 1965 that interfered with the current goal of fair employment. To legislatively and judicially navigate between employers, unions, white male employees, and those facing discrimination in the past is difficult, as will be subsequently established.

During a period of industrial expansion and opportunity, it is less of a chore than during a recession to protect minority rights while safeguarding the interests of long-time white male employees, who cannot be faulted for past discriminatory employer and union practices. With many job openings, a little legal or judicial juggling results in palatable answers, even when not totally satisfactory to all disputants. However, with the economic recession starting in 1974, the problems of assuring fair play multiplied, the last hired being the first furloughed or discharged and the last recalled. Prior to 1974, the seniority questions litigated were almost exclusively job promotions rather than furloughs, the economy being comparatively healthy.

If seniority clauses were without some social redemption, legislation could be considered outlawing its use. However, most critics and employees feel that seniority serves a useful purpose. For example, take the age discrimination laws later reviewed. Seniority clauses in contracts and laws outlawing age discrimination in employment share, in many ways, the common purpose of protecting aging employees on the job. Even employers acknowledge that seniority, with the possible exception of promotion, has merit.

By protecting and benefiting senior personnel, employers can claim employee loyalty in return. Employers seek employee loyalty, and employees in return expect loyalty from employers by favoring those with the longest service, a *quid pro quo* philosophy. In addition, seniority may reduce labor turnover and grievances, and improve morale by rewarding experience and expertise. Union leaders assert that employers today follow the public call for fair employment and even prefer minorities when holding federal and state contracts. Consequently, discrimination is seldom practiced and older employee needs, white or black, male or female, are in fact served by seniority provisions. This view is referred to as the "status quo" approach, ignoring the negative effects of past discrimination.

Those facing discrimination in the past contend that progress is uneven and slow. While some improvement is acknowledged, they contend that little can be accomplished currently if all vestiges of past discrimination are not erased immediately. Seniority agreements, consequently, cannot be tolerated which delay fair employment. The advocates of "freedom now" feel that too many blacks are prevented, by seniority illegally or immorally acquired before 1965, from moving upward and holding onto jobs. Because of the bi-polar positions of the "status quo" and "freedom now" advocates, courts naturally sought an intermediate solution when confronted with claimed violations of Title VII. If seniority serves a useful purpose while hindering fair employment, compromise may be in order. The courts then developed the "rightful place" approach, awarding promotions and job openings to those facing discrimination without disturbing white incumbents promoted under a seniority clause before 1965. Such a compromise placates somewhat those facing discrimination, as subsequently indicated, and white male job-holders, but it does not solve the problems created by reductions in force.

Congress, for all practical purposes, delegated to the EEOC and courts authority to establish rules governing seniority agreements, possibly recognizing a need to accommodate diverse interests. Section 703(h) legitimizes agreements with "different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate." The language is broad and indecisive; Congress wished to preserve "seniority," providing it was "bona fide" and "not the result of an intention to discriminate." "Bona fide" and "intention to discriminate" could be viewed as one congressional guideline—a seniority agreement is "bona fide" if not intentionally discriminatory—or as separate indicators of validity. While "intention to discriminate" is a matter of proof, Congress did not, probably deliberately, indicate what was or was not "bona fide." While it is possible to conclude that Congress shunned responsibility by not providing more guidance, the reference to "bona fide," without more, is justified, there being numerable factors, many unforeseeable, that enter into the negotiation and enforcement of seniority clauses.

Section 703(h) can be interpreted so that only the seniority agreement intentionally discriminatory is not "bona fide." After all, there is some merit to a philosophy that extends protection to older workers. Yet, proving intentional discrimination in a court following the legal rules of evidence and trying to justify seniority agreements because of efficiency when employers and unions compromise while negotiating is burdensome.

The Supreme Court, in *Duke Power Co.*, took the position that employers testing and requiring high school diplomas not justified by business need violate Title VII even if the discrimination is unintentional. The conclusions drawn by the Supreme Court are apropos in seniority complaints, easing the load of establishing employer-union wrongdoing. The "bona fide" quality of a seniority clause should not be determined by establishing intentional discrimination, but by the impact upon those facing discrimination if fair employment is to become a reality. If a seniority clause negatively affects a substantial number of employees discriminated against in the past, court should carefully evaluate employer and union justifications as well as statistical, interpretative, and constitutional questions.

There are four basic types of seniority agreements—company, plant, department, and job. Company seniority protects workers in all plants, irrespective of location. Because it is uneconomic where plants are spread widely or where there is product diversification, few agreements call for company seniority. Plant seniority may also be uneconomic, as all employees in the plant, irrespective of skill, are lumped together. Unless employees are easily transferred and skills are similar, plant seniority is inefficient. However, many long-time black employees traditionally restricted to the hot, heavy, and lesser-paying jobs—the steel industry is an example—would benefit if plant seniority were substituted for department or job seniority. Departmental seniority is the most common (distinctions can be made on the basis of jobs held within the department) because the skills and tasks assigned are homogeneous, permitting efficient operation. This type of seniority has injured those facing discrimination in the past, hired for menial jobs without hope of promotion. Job seniority is where all employees with the same skills—electricians, carpenters, butchers, etc.—are lumped together irrespective of the department worked in.

Fair employment is further complicated by transfers to other departments, transferees losing seniority accumulated in the past and/or bumping rights. If seniority begins when assigned to a new job and bumping rights are lost, black employees reluctantly seek transfer, particularly when there is a temporary reduction in pay or economic recession.

Until 1974, the seniority questions taken to court concerned transfers from lower paying departments to those promising greater financial reward. These decisions will now be reviewed. In *Quarles v. Philip Morris,* *Inc.*,[12] the employer until 1966 segregated and paid black employees less than white employees. In 1966, the collective bargaining agreement was renegotiated so that black employees could transfer to other departments. However, those transferring lost seniority previously accumulated. The plaintiff, under Title VII, sought a job in another department as a truck driver, claiming entitlement to a job assigned to a white prior to 1966, advancing a "freedom now" argument. The court recognized that the continuation of department seniority would prevent employees hired before 1966 from moving to other departments. On the other hand, section 703(h) protects the "bona fide seniority" agreement, so that the employer in his defense advanced "status quo" rationale. Adopting an intermediate position, the court, while finding a fair employment violation, did not permit the plaintiff to claim the job taken by a white before 1966; instead, the first opening as a truck driver was to be offered to the plaintiff without loss of seniority. The court in essence ruled that section 703(h) did not legitimize agreements calling for department seniority where past discrimination currently injures black employees.

Section 703(h) did not legitimize the accumulation of seniority that "has its genesis in racial discrimination," according to the court. To support the plaintiff, the collective bargaining agreement was overruled, the court substituting plant for department seniority, endorsing the "rightful place" approach.

While some lower courts accept the "status quo"[13] and "freedom now"[14] theories, the "rightful place" approach has been overwhelmingly endorsed.[15] It should be noted in *Quarles* that driving a truck requires some experience and skill, but not years of training or other extensive preparation. Should a warehouse employee claim a job as a tool and die maker, a highly skilled job requiring years of training, it is not certain that the *Quarles* court would impose a similar remedy. In this situation, the employer could advance a "business necessity" argument per *Duke Power Co.* In *Papermakers Union*, the appellate court followed *Quarles*, clearly taking the position that a seniority agreement apparently neutral was illegal under Title VII if the effect is discriminatory, a rule later endorsed by the Supreme Court in *Duke Power Co.* There was evidence that the employer and union in *Papermakers* engaged in discrimination prior to 1965 that had a negative effect, currently, on black employees.

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[12] 279 F. Supp. 505 (E.D. Va., 1968).

[13] U.S. v. H. K. Porter, 1 FEP Cases 515 (USDC Ala., 1968).

[14] Patterson v. American Tobacco Co., 8 FEP Cases 778 (USDC, E.Va., 1974).

[15] Robinson v. Lorillard Corp., 319 F. Supp., 835 (M.D., N.C., 1970); U.S. v. Local 189, Papermakers Union, 416 F. 2d 980 (CA 5, 1969), *cert. denied*, 397 U.S. 919 (1970); Long v. Georgia Kraft Co., 62 CCH Lab. Cas. 6712 (N.D. Ga., 1970).

The impact of these decisions on collective bargaining and seniority agreements is significant. Since discrimination was the rule and not the exception, most seniority clauses having a negative effect on minorities hired before 1965 cannot be enforced, courts manipulating agreements to assure fair play. While an efficiency or safety justification was not claimed by the employer in *Quarles*, which could fall within the "business necessity" exception, other courts looking at seniority and entitlement to promotion have not bought this rationale, employers held responsible for failing to train minorities.

Since 1974, the start of considerable economic adversity in the United States, complaints have been brought under Title VII of the negative impact on blacks and women of seniority clauses on layoff and recall. Another dimension was added to the court dilemma. For long-time employees, the negative impact of seniority on promotion and transfer is apparent, readily established by showing discrimination prior to Title VII. However, even if employers discriminated in the past, employees currently hired are not negatively effected. To outlaw the past accumulation of white seniority smacks of reverse discrimination, prohibited by section 703(j), and may be constitutionally reprehensible. But if layoffs hit black employees harder than white employees, upholding the legality of seniority agreements continues discrimination common in the past. An interpretative question raised by *Duke Power Co.* in seniority cases is whether unintentional discrimination can be reached under Title VII when neither past nor current discrimination aimed at the complainant can be established.

Today, the layoff rate in the black community is considerably higher than in the white community because of the recession. For employees hired at a time when employers intentionally discriminated, any seniority system can be attacked under Title VII, to prevent layoff and speed recall. But the legal issues revolving about minority employees hired on a fair basis are more complex.

In *Watkins v. Steelworkers Union, Local 2369*,[16] the district court found a violation of Title VII when all but two black employees were laid off under a seniority provision and the employer discriminated prior to 1966. The court reasoned that section 703(h) does not legitimize a seniority agreement that perpetuates past discrimination even though the employer had never discriminated against the employees suing under Title VII. Fashioning a remedy was difficult, and the court did not cancel the agreement calling for plant seniority. Instead, the court ordered the employer to recall a sufficient number of black employees to maintain the racial balance achieved prior to the layoffs.

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[16] 369 F. Supp. 1221 (1974).

The remedy ordered in *Watkins* (and the basic philosophy) is controversial and it is doubtful that many courts would adopt this view. Title VII does not require an employer to employ more labor than is needed, which is what the court dictated if white employees with more seniority were not laid off. In *Waters v. Wisconsin Steel Works*,[17] a seniority agreement was upheld even though there was evidence of past discrimination and one plaintiff was refused employment for racial reasons prior to being hired. Without referring to the district court decision in *Watkins*, the court in *Waters* said:

> Title VII only speaks to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination not created by them but by their employer. . . .

The conclusion drawn by the *Waters* court may be correct, but the supporting rationale is less than convincing. While employees are not responsible for employer actions, unions representing them negotiate agreements providing for seniority, hiring halls, etc., obviously operated in a discriminatory fashion in the past. Since unions represent employees, it can be assumed that the will of white members is reflected in the current negotiation process. Under these circumstances, are the white employees as "clean" as indicated by the *Waters*' court?

The court in *Waters* agreed that section 703(h) outlawed seniority agreements retarding promotion and transfer, but reverse discrimination is forbidden by section 703(j) when economic conditions require layoff. By noting that all but one employee had been fairly employed, section 703(h) protected the "bona fide seniority" agreement. To rule that the seniority agreement was outlawed would seriously test the constitutionality of the fair employment legislation, a possibility to be avoided by the court in *Waters*.

The *Watkins*[18] decision was subsequently reversed, the appellate court stressing that none of the plaintiffs had faced employer discrimination and that preferential treatment was prohibited by section 703(j). A novel argument was advanced by the plaintiffs, conceding the legality of the layoffs but denouncing the recall system which jeopardized future employment. The system of recall in no way perpetuated past discrimination and, accordingly, was protected by section 703(h), according to the court.

A factor not considered by the district court in *Watkins* was the impact of its decision should older white employees be laid off by the employer to make room for black employees. The brunt of the layoff would have been borne by white employees over 45 years of age and such a court construction of Title VII conflicts with the federal law protecting the employment rights of employees between the ages of 40 and 65. As later discussed, the federal age protection law acknowledges the legitimacy of seniority clauses protecting older employees. If there is no evidence of intentional race discrimination in *Watkins*, the district court ruling clashes heads on with the congressional desire to protect the job rights of older employees. The age laws will be more thoroughly explored in a subsequent chapter.

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[17] 502 F. 2d 1309 (CA 7, 1974).

[18] 10 FEP Cases 1297 (CA 5, 1975). Also see *Acha v. Beame*, 12 FEP Cases 257 (CA 2, 1976) where sex discrimination was involved.

In *Jersey Central Power and Light Co.*,[19] the collective bargaining agreement called for company seniority. Subsequently, the EEOC during conciliation convinced the employer to ignore the collective bargaining agreement to favor minority employees. However, the union balked, insisting that the seniority agreement be honored. The dispute between the union and employer was taken to an arbitrator who ruled that the seniority clause, because of EEOC intervention, could be ignored. The appellate court, under Title VII, decided that the conciliation agreement did not conflict with the seniority clause, the former only applying to the affirmative hiring of minority and female employees, while the seniority clause only applied to those already employed (there is some doubt that this is what the EEOC intended). The court, concluding that company seniority was "bona fide" under section 703(h) even if past discrimination is perpetuated, felt that Congress intended to bar the submission of evidence that the seniority clause perpetuated past discrimination. This construction appears to be contrary to *Duke Power*, where the Supreme Court did consider the impact of past discrimination.

On March 24, 1976, the Supreme Court, in *Franks v. Bowman Transportation Co.*,[20] ruled on the effect of a seniority agreement when employment is illegally denied. The appellate court had ruled that an illegal refusal to hire does not effect the "bona fide" quality of the seniority agreement, somewhat in line with the *Central Power* decision. The Supreme Court in *Bowman* felt that the appellate court erred because the plaintiffs did "not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire." The Supreme Court reversed because Congress did not intend "to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurred after the effective date of the Act. . . ." The court felt that it was proper to award seniority from the date that employment was wrongfully refused to assure the plaintiffs their "rightful place."

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[19] 9 FEP Cases 117 (CA 3, 1975).

[20] 12 FEP Cases 549. This decision has been reprinted at end of textual material.

Limiting the potential reach of its decision, the Supreme Court felt seniority need not always be granted to complainants, the courts having the right to exercise discretion. Whether seniority is to be awarded will depend upon "the attainment of the Act's objectives. . . ." Thus, such factors as openings and fitness could result in a denial of past seniority. However, the burden of proof, once discrimination is established, is upon the employer.

The employer also argued that white employees with seniority would be injured if the plaintiffs were granted seniority from date that employment was wrongfully refused. The Supreme Court concluded that white employees would have to share the burden of the employers' past discriminatory practices; this was only fair, especially since "employee expectations arising from a seniority . . . agreement may be modified by statutes" or subsequent contracts.

If employees are not represented by a union, the question arises as to whether an employer who lays off on the basis of seniority violates Title VII. If company policy or past practices clearly indicate that seniority determines layoff and recall, it seems that the plan is "bona fide" even if the employer, prior to Title VII, discriminated, absent evidence of current negative effect. But if there is no clear cut seniority pattern or policy, an employer favoring white or black employees is suspect under Title VII. In either event, it would be difficult to establish the "bona fide" quality of the system of seniority. Many other interpretative problems revolving about seniority and section 703(h) need to be answered, even where employers have been commended for affirmative hiring.

Apprentice Training and Recruitment

As a rule, racial (and sex) discrimination increases with the skill required, pay scale, and prestige of the job. After the federal executive orders and contracts stipulated fair hiring and state fair employment laws were enacted, employers and unions engaged in buck-passing, seeking to avoid responsibility for discrimination. Critics faulted employers, unions, and federal and state agencies sponsoring training programs operated in a discriminatory fashion. Vocational high schools and federally approved apprenticeships often excluded minorities from training, justified because jobs would not be available to them. Take the Washburne Trade School operated by the Chicago Board of Education, where blacks constituted only one percent of the student body and they were barred from six of the twelve training programs. Public authorities in Chicago shunned responsibility, claiming that a committee of employer and union representatives selected the candidates eligible for training. Local 28 of the Sheet Metal Workers Union, operating a training program in New York, did not permit black members or apprentices for the first 75 years of its existence.

Before 1964, many employers and unions openly discriminated; considerable evidence is available to establish intentional wrongdoing, morally, if not legally, reprehensible. Union constitutions restricted membership to white applicants, or segregated locals were operated. Unions operating hiring halls would not refer black jobseekers to employers. Title VII clearly outlaws discriminatory recruitment and apprentice training. After the passage of Title VII, overt discrimination, as could be anticipated, disappeared without significantly breaking the racial barriers. Intentional discrimination is difficult to establish once employers, unions, and employment agencies are put on guard, one reason for the importance of *Duke Power Co.* Some employers and unions inadvertently continue discriminatory patterns because the methods relied upon to recruit and train apprentices do not attract minority applicants. It was soon apparent that recruitment and training policies could deter fair employment however well-intentioned the employers and unions. If those facing discrimination do not contact recruiters, or recruiters do not contact minorities, employers and unions are not intentionally discriminating, but fair employment is not realized.

Another complication that unquestionably plagues public officials charged with assuring fair employment is the migration of industry, particularly white collar and light industry, to the suburbs, while minorities remain tied to ghetto communities in the city. Because of tax advantages, land costs, expansion needs, location of work force, insurance costs, and crime, employers move their plants to the relative peace of the suburb. Even fair employers can bypass the hiring of those traditionally facing discrimination given these circumstances. Blacks interested in following the firm are troubled by the time and cost spent in traveling to work and the unavailability of public transportation. Many, however, are unaware when jobs are open in the suburbs.

In addition, blacks in urban centers are turned off by suburban living, knowing that whites deliberately escape the city, fearing racial discrimination. Blacks, for political, economic, and cultural reasons, disapprove of moving to suburbs, claiming need to maintain a cultural identity in the city. By concentrating in the city, black influence in local, and, to a lesser extent, state and federal politics is maximized, able by sheer number to elect black or white officials supporting the black viewpoint. Local power for blacks is new and only recently has the ghetto become aware of its political potential. Unfortunately, while black political power increases, the economic well-being of ghetto dwellers lessens as employers leave the city. Some black political leaders claim that while the loss of employment opportunity hurts in the short run, the long-run outlook is more positive, spurring black entrepreneurship. In addition, dispersal is not advisable, as community ties break and disappear, if cultural traditions are to be preserved. Black pride is a recent development, and there is an economic price, at the least in the short run, that the ghetto residents pay for deliberate isolation. And blacks, probably rightfully so, are unwilling to buck antagonism in the white suburb.

For ghetto residents willing to move, a serious stumbling block is the unavailability of cheap or public housing in suburbs. Suburban communities, through zoning codes, have kept out cheap and public housing, claiming a need to preserve property values, prevent higher taxes, assure quality education, etc. However well-intentioned, the effect of suburban housing policies has been the maintenance of white purity industrially and residentially. Blacks willing to integrate cannot buy or rent inexpensive homes or apartments in suburbs.

Plant migration to suburbs has improved the ability of women, married women in particular, to find suitable employment. Married women with young children are often interested in part-time work only; if willing to work 40 hours per week, they may be less willing than men to spend hours traveling to a job in the city. Some blacks are willing to relocate or travel long distances if suitable jobs were available. The decision in *Duke Power Co.* may prove valuable to break the unintentional barriers created by travel costs and distances. By looking at the methods of recruitment, employees, employers, unions, and employment agencies, public and private, can be held responsible under Title VII. Recruitment methods traditionally used are word-of-mouth referrals, hiring halls, public and private employment agencies and newspaper advertisements. Surprisingly, the most important source of new employees is word-of-mouth referrals. While some recruiting is done by radio, television, and vehicles carrying loud speakers, these methods are infrequently resorted to (unless affirmative hiring has been required).

The means used to recruit complies with Title VII if minorities receive the same encouragement and opportunity as others. Statistically, and for evidentiary purposes, recruitment is fair if the percentage of black job applicants corresponds to the percentage of white candidates living reasonably close to the plant. Achieving this ideal is statistically unlikely if the comparative area is wider than the suburb where employers are located. Absent considerable effort at affirmative recruiting, the costs and time spent traveling and barriers to suburban living for minorities rule out statistical equality. The distance between the plant and place of residence indicates that ghetto residents are less likely to know of employment opportunities than those living close to the plant. White employees are also likely to have white friends, informing them of job openings.

If evidence establishes intentional discrimination, a possibility because employers seek to escape racial turmoil by moving to the suburb, Title VII is violated. It is less certain that Title VII is violated if unintentional discrimination is claimed per *Duke Power Co.* A position could be taken that relocating in a suburb is a *per se* wrong, employers aware that they are running away from city difficulties, the burden of proof shifting to employers to produce evidence of "business necessity." Such an approach does not differ considerably from the Supreme Court decision in *Duke Power Co.* But there are serious constitutional hurdles in trying to reach employers leaving the city under Title VII.

A legally less difficult tactic to justify to support a charge of discrimination is to focus upon the methods of recruitment and the statistically negative effect on minorities. Employers infrequently question why one method of recruitment is better than another. Under such circumstances, employers claiming that one means is more efficient that another would experience difficulty supporting this claim. As stated in *Albemarle Paper Co.*, if a means can be used that is less discriminatory than others to establish the job-relatedness of a test, the employer is obliged to abandon the more discriminatory method, even if technically acceptable. If method A leads to more opportunity for blacks, the employer is obliged to abandon method B, even if not intentionally discriminatory, providing equally efficient employees can be recruited. If the additional cost of shifting to another means of recruitment is small, a distinct probability. employers cannot establish "business necessity," the exception provided for in *Duke Power Co.* Even if recruitment costs rise dramatically, it is unlikely that the increase will be quantitatively substantial, negating a possible claim of "business necessity." In fact, the use of a supplementary source of recruitment should prove beneficial, tapping a larger and possibly more efficient pool of labor than before.

If the plant is located in a suburb, it is inevitable that the job applicants recruited will be white when word-of-mouth recruiting is used. Most white people live among or are friendly with other white people and word-of-mouth recruitment, however innocent, has the effect of excluding minorities. Employers claiming that they recruit affirmatively, relying on word-of-mouth referrals, are not realistic.

Employers forced to turn away from word-of-mouth recruiting by court order could claim that the labor force attracted was numerically insufficient or less efficient (tardy, absenteeism, spoilage, unwilling to work overtime, etc.), a "business necessity" argument that would support the legitimacy of this form of recruiting, a plausible position in suburbia. Advertisements in black- or white-owned newspapers may not reach the type of worker needed. For example, many qualified blacks are unwilling to be identified with a police force and refuse employment as a suburban (or urban) policeman. Consequently, city or state recruiters should be able to return to word-of-mouth referrals without violating Title VII. But employers should be required to show that a reasonable effort was made to recruit on a fair basis.

The hiring hall presents another barrier to fair employment. State right-to-work laws, sanctioned by section 14(b) of the Taft-Hartley Act, outlaw all forms of union security; yet, the hiring hall contract, which, in many ways, serves the same purpose as a union security agreement, is legal in every state providing union and nonunion members are referred without discrimination. For example, the hiring hall is used extensively in the longshore and construction trades. Some employers maintain that some types of skilled labor are only available through union-operated hiring halls.

Unions were not required to refer minority job-seekers until the passage of Title VII. In spite of a predominant white membership, it is difficult to establish that hiring halls are operated in a discriminatory manner. Those facing discrimination seldom seek union referrals, aware that nonmembers and minorities are not served. Statistically, this creates a dilemma. For example, qualified blacks residing in a community do not show up at hiring halls to seek referrals, and intentional discrimination is difficult to establish. The effect doctrine established in *Duke Power Co.* creates the possibility that hiring halls referring few qualified blacks where many reside can be outlawed. In *Duke Power Co.*, the employer required high school diplomas and tests, committing an act condemned by professional critics. Unions fairly operating a hiring hall, on the other hand, are not committing a discriminatory act—at best the failure of blacks to seek referrals can only be implicitly attributed to unions. Nevertheless, a system of recruitment that limits black opportunity could be reached under Title VII.

Many employers rely on private employment agencies to secure help. Some private agencies specialize in securing certain types of help, like executives, engineers, etc. To secure the highly skilled and professional, employers turn to private agencies that cater to the whims of those paying the fee. Knowledgeable and skillful, it is particularly difficult to prove intentional discrimination against operators of private employment agencies. Statistical data could be used to show that few blacks are referred through the private employment agency, establishing a prima facie violation when employers are served who seek many employees. It seems reasonable to assume that the fair placement of minorities in responsible and managerial positions is more difficult to achieve than in less important jobs, and legally controlling the means of recruitment is important to end discriminatory placement. The past placement records of private agencies can be checked against the employment records of employers using their services to show intentional or unintentional discrimination, that qualified blacks are not referred or that few appear. Care however should be exercised in the use of Title VII and *Duke Power Co.;* for example, statistical data does not necessarily reflect unintentional discrimination against black people when mathematicians and physicists are recruited since few are qualified. Yet, such evidence could establish discrimination against the Oriental.

SEX DISCRIMINATION

Chapter X

RELIGION AND ANCIENT CIVILIZATIONS

An examination of the major western and eastern religious doctrines conclusively establishes male dominance over the female. The subordinate position assigned to women, whether divinely ordained or necessary as claimed by later social commentators, became firmly entrenched in legal systems throughout the world, with women protected judicially and legislatively "for their own good." During early Christianity, women were honored if they submitted to church control and assumed subservient roles therein. Since women were to be meek and mild—escape was only tolerated in church ritualism—protection from the sinful world was necessary.

The legal doctrine that developed in the United States, based largely on the English common law, did not provide for male and female equality, "protecting" women out of inheritances and job opportunities. The second class citizenship assigned to women has been difficult to break in the United States and elsewhere, and nowhere is it more evident than in the church hierarchy. While the 1920 Nineteenth Amendment guaranteed suffrage, progress has been slow, given the male dominance over the religious, economic, and political scenes. To understand current-day attitudes, a brief review of religious doctrine is essential.

The male, historically, has probably been physically stronger than the female, a physiological fact that inevitably leads to dominance in a society relying upon muscle to survive and produce. Another physiological factor contributing to the inferior status of women was the birth of children, especially when birth control was unknown or unreliable; physical activity from necessity is limited before and after birth, and children must be cared for. Acquiring food is a constant challenge and enemies plentiful while religions are formalized. Such conditions help to create a society in which the physically stronger sex plays the dominant role. To some extent, survival is incorporated into religious doctrine, and hardship and the unknown is described to provide guidance. Religious tracts consistently advanced positions attuned to religious Darwinism, the fittest surviving, succeeding, and ruling.

After male superiority is established, backed by religious rationale, control is not willingly relinquished even when the environment changes. When centralized authority is considered essential for survival, the religious, economic, and political systems prevent change, now treated as a preferred way of life. Later, women are allowed partial participation in the system, geared to roles as homemakers, but restricted by positions assigned in the past.

The ancient Hebrews, like Muslims, were religiously permitted more than one wife. The father of a daughter was paid a purchase price and the daughter "sold" to her husband. If giving birth to a son, the wife was entitled to greater respect, having assured the continuation of the family name. The wife's position was not only a sign of male dominance, but guaranteed an inferior role in society. Married women, stepping out of line, which could mean nothing more than that they failed to please their husbands, were easily divorced, while women were not always permitted to secure divorces. Only men could become rabbis, a rule enforced even today by orthodox Jews; only recently has reformed Judaism permitted female rabbis. Even today, women in orthodox synagogues are not permitted to place a prayer shawl, the *tallis,* across their shoulders or wear phylacteries, *teffilin,* during prayer. And women are still not permitted to recite from the *Torah* (scroll) housed in the synagogue.

The morning prayer recited by the male Jew blessed the fact that he was not born a woman. The female during the marriage ceremony promised to obey her husband, a practice followed in other religions. Property rights listed in the *Decalogue* include land, buildings, domesticated animals, slaves, and wives. The wisdom displayed in the Holy Scriptures is a conversation between two men, the female totally excluded. The wife was responsible for the education of children, managing the household and helping in the fields, but she was not the equal of her Hebraic husband.

While limited rights, protective in nature, were given to the female Jew, the Greek civilization was even more dominated by the male. Greek artists were occupied with the muscular male body and not the Playboy centerfold type. Physical prowess, strength, daring, and intellectual pursuit were for the male, while the female bore children and tended to the home. While goddesses inferior to male dieties cavorted in the celestial heavens, females on earth were not highly thought of. The bisexual Greek male frequented the gymnasium where the body was conditioned, and friendships, intellectual and sexual, were formed with other men. The female was considered intellectually and socially inept, not fit for male companionship. Aristotle and other Greek intellectual stars found the female character defective.

The lot of a Roman wife was a cut above that of a Greek wife; the male appreciated a witty woman and she was better protected under the Roman law than the Greek law. Roman men partied with their wives, unlike the Greeks. The Romans prescribed rules regulating relationships within and without the family, defining, with legal positivism, the role of women. Females were not assigned equal roles, as men functioned as authoritative heads of the family, dominating the political and economic scenes. The Roman, Cato, said during the second century B.C., "If you catch your wife in adultery, you would kill with (legal) impunity, without a trial, but if she were to catch you, she would not dare lay a finger on you, and, indeed, she has no right." Men were expected to be gadflies, while women were respected only if true tc their husbands.

Christianity, the most significant force in the Western World, called for a single standard of sexual conduct for men and women. Sex out of wedlock was frowned upon as were polygamy and divorce. In addition, Christian religious leaders urged that women be permitted to inherit property. St. Paul took the position that "(t)here is neither Jew nor Greek . . . male nor female . . . slave nor free . . . for you are all one in Jesus Christ. . . ." Such an isolated statement, while not requiring sexual equality outside the home, could be interpreted in such a fashion. But St. Paul clearly established the superiority of men, since women were created from men, and not men from women. Husbands headed the household, and wives were accountable to their spouses. St. Ambrose took the position that women led men into sin, entitling men to assume leadership roles in the community. Canon law, established in the fourth century, treats marriage as a necessity, a means of controlling human frailty and protecting the family.

Gregory VI imposed celibacy upon the priesthood because of the evil of women. St. Thomas felt that women were imperfect men, created, after all, from Adam's rib. Liberationists of today would disagree with an interpretation that St. Paul called for equality by stating "you are all one in Jesus Christ." Per Timothy 2:12, woman "shall be saved in childbearing, if she continues in faith and charity and holiness with sobriety." Absent "childbearing," women, evidently, were not "saved," except in marriage or within the Church, situations in which men dominated.

Formalized religion has always been uncomfortable—perhaps mistrusting is more accurate—of women. Perhaps discomfiture is only natural, Christian doctrine emanating from sheltered and suspicious males. As expressed by St. Ambrose, "Adam was deceived by Eve, not Eve by Adam." Taking a vow of celibacy to better serve God, men of the cloth feared women who could lead them astray, the theme in *Rain* by Maugham.

Mary, the virgin Mother of Jesus Christ, was glorified by theologians, possessed of character mortal women could not attain. While Mary is assigned a positive role in Christianity, to some extent neutralizing the role assigned Eve, theologians evidently viewed Eve as more representative of women. While women could inherit Eve's characteristics, the virtue of Mary, who conceived Christ immaculately, could not be attributed to all women.

While Eve may have tempted Adam, the illusion that women are responsible for tempting men is far-fetched; men are more often sexual aggressors than women. But Church doctrine, serving what is conceived to be a useful purpose, is changed with difficulty, even after evidence is produced pointing to scholastic inaccuracies. Church scholars and others eventually shifted emphasis from the shortcomings of Eve to the lack of intelligence in women. John Knox, offended by a Catholic queen ruling England in 1558, took the position that women were foolish and emotionally unstable. Women, isolated in the home and with less schooling and practical business experience, were then treated as less intelligent than men.

The same male bias toward women is evident in Eastern religions. Hindu doctrine calls for the isolation of women during the menstrual period, forbidden to bathe, sleep on a bed, ride an animal or contact her children. On the fourth day of the menstrual period, purification in the river is required (a similar purification rite, the *Mikvah*, is provided for in Judaism).

To "protect" women, the Hindu Law of Manu provides:

> Day and night, women must be held by their protector in a state of dependence. . . . By confinement at home, even under affectionate and observant guardians, they are not secure; but those women are truly secure who are guarded by their own good inclinations.

The marriage manual attributed to Confucius conflicts with current ideology expressed in Communist China, perhaps a reason why his thinking is no longer favored. Confucius branded women as jealous, stupid, and brimming with discontent; given these manifestations, they had to be controlled.

Much of the Western and Eastern religious philosophy was endorsed by scientists during the eighteenth, nineteenth and twentieth centuries. Darwin, like Aristotle and St. Thomas, held that women were physically and intellectually inferior. Freud, observing the human psyche with considerable skill, concluded that women's character was shaped by penis envy, leading to insecurity, secretiveness, and intellectual inferiority. Freud's influence was and probably remains considerable. Church leaders reacted strongly to his view of religion, but did not criticize his conclusions about women.

The brief summary of religious doctrine was intended to show male dominance and the absence of female input into religious doctrine. With physical superiority, superior education, and endorsement from Above, it was inevitable that public policy would favor men over women.

Chapter XI

INDUSTRY AND FEMALES

The inferior role assigned women by religion and the ancient civilizations was later followed in industrial societies, although the rules of the game were refined. Religion, war, depression, pestilence, and technology—all led to some changes beneficial to women. The role played by the feminist movement in the United States since the nineteenth century should not be slighted—that it helped to initiate or accelerate change is demonstrable. However, technological and industrial conditions also helped to initiate changes helpful to women, however miniscule and grudgingly granted. The shifts that took place, economic, social, and legal, will now be detailed.

While agriculture was the economic kingpin and the bulk of society lived in rural areas, the traditional role assigned women was difficult to change. The Industrial Revolution introduced employment in the plant, store, or office, separated from the home or family farm. The butcher, baker, and candlestick maker worked in or alongside his home but the Industrial Revolution introduced the large plant and machinery, creating an impersonal environment. While women and children were expected to help the head of the family operate the small shop or farm, actually extensions of the household and obligatory service, a radical change took place in urban centers, husbands working for a corporation at a distance from home. With labor in short supply, women, particularly the unmarried, became an important source of cheap labor. Some women held factory jobs before the Civil War, most of them young and unmarried. Married women, supplementing family income, engaged in cottage work even after the Industrial Revolution.

The family farm after the Civil War was still a reality, and wives and children helped their husbands. Female immigrants and others coming to the city sought employment in the factories, finding their way into the low-paying unskilled and semi-skilled jobs. Before the twentieth century, some women working in factories were married or widowed. But few saw their industrial tour of duty as a lifetime career; rather, the factory job was a temporary affair.

The impact of the Industrial Revolution was swift and substantial. After the turn of the twentieth century, more than 50 percent of the population in the United States resided in a city where factory and office work was available. It was common for men and women to work long hours, sometimes 16, six days a week, without vacation or holiday pay. While the cottage industries provided some opportunities for the homemaker, they were insignificant, and women were needed in factories. While the economic revolution changed the life-style of men and women, neither organized religion nor society changed the traditional views of the proper role of women. Women raised children and cared for the home, limiting their need for education. Women were taught elementary reading, writing, and arithmetic; the more fortunate were sent to a finishing school, later expected to participate in charitable work. Apprenticeship training and industrial schooling, other than cooking and sewing, was not considered necessary for women. As a result, women finding their way into factories were largely unskilled, with few possibilities for advancement. At the end of the nineteenth century, approximately four million women, almost one-sixth of the total labor force, if not on farms, worked in the needle, cotton, and woolen trades, or as domestics, most unmarried or widowed, immigrants or first generation Americans. Women holding professional jobs taught in grammar and high schools or worked as nurses.

Geared to physiological and cultural differences, few women were trained or physically equipped to hold many factory jobs. State laws were enacted during the nineteenth and twentieth centuries reflecting the Victorian notions of the female need for the protection of her physical and moral wellbeing. These laws fell into the following categories:

1. Minimum wage, rest periods, bathroom and locker room facilities, etc. The same laws protecting men were ruled to be unconstitutional.
2. Maximum hours, night work prohibitions, limits on weight lifting, etc.
3. Barring women from jobs as miners, bartenders, etc., to protect morality or health.

Technological changes and the global wars of the twentieth century infrequently drained the male labor supply, and patriotic women trained for semi-skilled and even skilled blue collar jobs. While involvement in World War I was short, the weaker sex indicated that they could fill physically demanding and skilled jobs. Women, it became apparent, were protected to keep them in the home, and much of the social legislation was unnecessary. World War II pointed to the military superiority of the technological society, and many women held blue collar jobs in munitions, shipyards, aircraft, etc. In fact, women in war zones, part of the military, performed well under adverse conditions.

Many of the jobs open during World War II required people trained as engineers, physicists, chemists, and skilled blue-collar craftspersons, occupations requiring considerable education and training, and little brawn. As more women completed high school and even college, prior claims that women were ill-suited for skilled and professional jobs in industry became even less acceptable. Machinery substituted for physical strength meant that women could fill many blue collar jobs. However, education was essential.

Parents after World Wars I and II sent daughters to college to acquire social polish and find suitable marital mates, viewing higher education as a substitute for finishing school and universities as matrimonial agencies. Men with college degrees would be more successful than those with less education, and parents wanted the "best" for their daughters. Women completed one or two years of college and, in keeping with family expectations, married and/or dropped out of school. Some women completed their college education, and others who didn't balked at spending a lifetime caring for children and a home; educated women became more reluctant to stay at home. Slaveholders in the South feared educating the black, and equal education for women contributed to the female uprising. As often claimed, education is the best social and economic equalizer.

Post World War II was the civil rights era, characterized by demonstrations, violence, corrective legislation, changing judicial construction, and executive leadership. While primarily intended to help minority males, women benefited when a political framework was established that could be used to assure industrial equality for women. Spotlighting one form of discrimination eases the way to point to other forms of discrimination, and the corrective mechanism to be used is already established.

In 1940, one woman in four was permanently attached to the labor force; today, one woman in three works or seeks employment. As of 1955, one worker in ten was occupied on a farm, including women owners and permanent and migrant laborers. The total number of white collar jobs exceeded the total number of blue collar jobs by 1955 due to the expansion of service industries and government employment. By 1980, only one worker in 50 will be farming. By 1980, seven out of every ten workers, men and women, will hold white collar jobs in government or industry. The total work force in the United States, excluding the military, currently exceeds 90 million with approximately eight percent unemployed. More than 30 million women hold or seek jobs in the private or government sector. However, few women are found in the skilled blue collar trades and professional and managerial categories.

From 1947 to the present, the percentage of adult male workers in industry declined from 87 percent to 80 percent while the percentage of women increased from 32 to 45 percent. Women are more frequently unemployed than men. Social Security benefits and pensions convince an increasing number of male workers to retire, contributing to the percentage decline of males in the work force. An additional factor is the age laws, federal and state, which usually prohibit job discrimination until 65 years of age, but not thereafter. Nonwhite female workers in the total force exceed white female workers by five percent, 49.1 to 44.1 percent. Nonwhite females are more likely to head a family and fall within the low income group than white females. In 1960, 25 percent of the mothers with children under five years of age were employed; in fact 16 percent with children under three were employed. By 1973, 38 and 29 percent of the mothers with children under five and three were employed. By 1980, the black work force will increase by 33 percent while the white work force will only expand by 21 percent. The laws promoting fair employment for blacks and females are potential causes of friction when both categories vie for the same jobs (unless there is a shortage of labor). By legally chipping away at the seniority systems favoring white males, there is an increased possibility that more white females and blacks can be employed.

Many women seeking job equality leave the home for financial reasons. Percentagewise, few women over 30 years of age are unmarried, while the divorce and separation rate continues to increase, forcing them into the job market. In addition, many wives outlive their husbands. Many married women with children of school age feel compelled to work because of the inadequate income of husbands, more true of black than white women. There are more unmarried black than white women with children in need of employment.

The interest married women exhibit in employment is not only based upon their husband's salaries but upon previously acquired skills and education as well as children. Married women without children and those whose children are over 18 years of age may not relish the thought of remaining at home, actively seeking outside stimulation. If children are young and in need of guidance, wives are more likely to remain at home.

Many women complete 12 years of school and work prior to marriage. However, older women are less likely to complete high school than younger women. More women today attend and receive university degrees, many seeking additional professional degrees. In 1972, two out of three working women held a high school diploma and one in seven completed at least four years of college. By 1985, 77 percent of the total work force may graduate from college, affecting considerably the employment opportunities of men and women. The student body during the fall term, 1974, The University of Iowa, consisted of less than 60 percent men and more than 40 percent women. It can be anticipated that even more women will complete college in the future in extension divisions.

Women with college degrees are more likely to remain a permanent part of the labor force than those with less schooling. College graduates, men and women, seek the same white collar and professional jobs, accentuating strain during periods of economic difficulty. Based on the current mix of white and blue collar jobs and industries, college graduates in 1985 may have difficulty finding suitable employment, an assumption based on the notion that the number of women with college degrees will continue to increase.

After World War II, the percentage of women holding jobs matching their education and skill dropped lower than ever before. Women with college degrees always found employment in the public sector as elementary and high school teachers, nurses, etc., probably because these jobs paid less than other jobs. In the future, more men will hold teaching jobs in grammar and high schools as unions improve working conditions and women find opportunity elsewhere.

Medical knowledge and preventive health measures have increased the life span of women who are physically and mentally able to join the labor force during middle age. While, statistically, certain diseases and physical conditions are associated with age, state and federal laws prohibit age discrimination if job-seekers are efficient and capable of working. Employers can no longer claim age as a rough barometer of physical incapacity. While not required to hire the physically disabled, employers must evaluate the individual employee without looking to his or her age (there are exceptions). And women with disabilities can hold many jobs.

The age and health laws later discussed aid women seeking employment when husbands die or are no longer able to work. Before the age laws, charges of sex discrimination could not be supported if men and women were denied employment because of their age and health. The age laws are particularly helpful to older females seeking entry after a long absence into the labor force. Men, more so than women, are prone to heart disease between 40 and 60 years of age; many wives outlive their husbands. If severely debilitated or holding a demanding job, males suffering a heart attack may be forced to retire or seek less demanding employment. Wives living in mortgaged suburban homes with children of college age, driving two automobiles, and forced to pay substantial real property taxes to support good school systems, seek employment rather than lower their standards of living. Another factor observable in suburbia today is the boredom of wives who are capable of shouldering responsibilities more challenging than cleaning house. Some wives develop emotional problems unless permitted to channel activities outside the home. As women are "liberated" and men increasingly assume household responsibilities, more women turn to industry as a necessary outlet, even those with young children. Some futurists already envision a society in which husbands and wives work, following alternating schedules that permit one spouse to remain at home with young children. This possibility becomes more likely as the average workweek is reduced.

The divorce rate continues to rise. Many Catholics do not accept the religious taboo against divorce found in Matthew, and society for a long time has not accepted the notion that God puts together marriages, desiring life contracts. The fact that religious annulments are tolerated indicates to society that bad marriages should be dissolved with approval from Above. Many no longer accept marriage as a lifetime contract when spouses are incompatible, even if young children are wrenched by dissolution. One result of women's liberation is that married women are free to seek their own life. In the past, women seeking divorces accused husbands of wrongdoing, necessary grounds for divorce. Divorces were not contested, and "alimony and child support" were awarded. Today, women without children may not be awarded alimony, and some attempt is made by judges to determine whether children would not benefit if custody were given to fathers. If older women, say 50, without children, are granted a divorce, there is less reason to award alimony when the right to employment is protected by sex, age, and health laws. Divorced women are sometimes forced to seek employment, at least more so than in the past, to support themselves. In fact, there is little reason for divorced women who are well-educated and trained not to work.

A battle resolved by the fair employment laws forbidding sex discrimination pertains to women with children who seek employment or promotion. Employers in the past would refuse to hire or promote women with children, claiming excessive tardiness, absenteeism, and preoccupation with household affairs. As collective bargaining agreements provided sick leave with pay, many employers felt that women with children abused this privilege. Today, a refusal to hire or promote women with children constitutes sex discrimination, violating state and federal fair employment laws. If proving excessive tardiness or absenteeism, employers can punish the wrongdoer, but blanket refusals to hire or promote all women with children would be illegal. It seems that employers, in accordance with *Duke Power Co.*, would not be able to establish "business necessity."

Even today employers consider unmarried women with children immoral, sufficient reason to refuse employment or warrant discharge. While employers are entitled to make judgments bearing on morality, the question, both constitutionally and under the fair employment laws,[1] is whether employment can be denied to females with illegitimate children who are competent and reliable. Not only is there a double standard—the responsible unwed male parents are seldom penalized by employers—but there is increasing doubt as to whether life away from the plant, an invasion of privacy, should be judged by employers.

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[1] The question of fair employment and parenthood will be treated in the next chapter.

There has been growing acceptance of the trial marriage to determine compatability. Some no longer believe in marriage and the future promises more informal relationships, temporary or permanent. People live longer and interests and opportunities shift, thereby increasing friction between two people living together. Unmarried people separating bear children who must be supported. The impermanency of the relationship means that the female, with or without children, is more likely to seek employment than if married. A 1973 statistic indicates that nonwhite females, by a ratio of 34 percent to 10 percent, are more likely to head a household than white females.

The assumption strongly supported by religion that a home and children assure fulfillment and maximize satisfaction is being challenged; women unmarried and without children were supposed to be inferior and feel dissatisfied. Today, many women mock the family concept, at least in the traditional sense, and scientists support limitations on family size because population outstrips the supply of food and ecological, atmospheric pollution, conservation of energy, etc., needs. In fact, limiting the birth rate is equated with good citizenship in some quarters. Some are not good parents and should not bring children into the world. Coupled with the growing notion that managing a household is not satisfying, women with few or no children are better off holding jobs.

An additive whetting female taste for employment is the type of job and income. More and better paying jobs have opened since the advent of fair employment legislation. As opportunities improve, even more women will find industry attractive; increased pay, a form of recognition, is an irresistible attraction.

Another factor tipping the scale is the accessibility of firms and transportation. White America has fled to the suburb, searching for the better life and seeking escape from city turmoil. This large-scale movement starting after World War II and accelerating during the 1960s and 1970s influenced changes in industrial location. Few jobs were open in suburbia after World War II; commuting to the city was a price the suburbanite husband paid for the "good life." Suburban wives were often unwilling to commute and fight heavy traffic. White collar and light industry jobs opened as firms left the city centers, and more suburban wives willingly left the home for jobs near home. While white migration to the suburbs has not gone unnoticed—the increased visibility of blacks and their growing power in municipal politics points to the population shifts—less publicity has been generated by industry moving to suburbia. This movement has decreased employment possibilities for blacks, while employment opportunities near home for suburban women have increased. A short drive to a plant, like ten minutes, at-tracts job-seekers, while inner-city residents are often unwilling to drive several hours to take a job.

While migration from the city to the suburb is commonplace and sectional geographic mobility is more prevalent than before, occupational mobility is increasingly difficult with age. As the average life-span increases, individuals spend more years in the same occupation. People should anticipate the probability that occupational shifts during their lifetime may be necessary because of changes in taste, income, technology, health, recreation, etc. But people reluctantly change occupations, even if hurt financially or their skills are not in demand. With aging males reluctant to shift occupations, women workers can latch onto many jobs newly created that men do not seek.

Women were forced to seek employment during the 1930 depression when husbands could not find employment. Wives remained in the work force after the economic crunch ended, the added money and change preferred to the routine of the home. Today, some women remain in industry, fearing depression and rising costs. From 1963 to 1973, families with husbands and wives working increased from 17 million to 22 million.

Demand for part-time labor increased, conditioned by a shortage of labor, inducing married women to leave the home. Married women are much more likely to accept part-time work than married men, especially if there are young children at home. Business conditions and collective bargaining agreements induce employers to seek part-time help, defined as those working less than 25 hours per week. Not only are there seasonal factors, but contracts providing pensions and supplemental unemployment compensation create an employer interest in hiring part-time help ineligible to claim these fringe benefits.

Qualified women seeking employment or promotion are not always welcome, especially in better paid and traditionally male jobs. In fact, as educated and skilled women seek employment, it seems likely that sex discrimination intensifies. If holding the same jobs, women may be paid less than men. The salary discrepancy is then justified by employers claiming that the duties or conditions of work are not similar. Managerial and professional jobs differ, making it easy to claim pay differentials, and few women are found in the better paying managerial, professional, and other jobs. Working women are concentrated in the lower paying jobs.

Chapter XII

FEDERAL AND STATE LAWS

Public and private employers continue to resist compliance with equal opportunity requirements of the state and federal laws. The reasons assigned for not complying with laws forbidding sex discrimination are many, reflecting a basic hostility to change. Some employers feel that women with young children should be in the home, tending to their flock, that the absence of parental guidance leads to juvenile delinquency (juvenile delinquency has been increasing). Women are expected to remain at home while men, the "natural breadwinners," are excused from daytime responsibilities by employers and society. Employers concerned with children do not see themselves as discriminators but as social benefactors. The Fifth and Fourteenth Amendments and state and federal fair employment laws calling for sexual equality are not easily accepted by male traditionalists who feel that their role and authority is downgraded. What is deemed fair employment today differs starkly from the past, and people change reluctantly. As stated by the Supreme Court in *Frontiero v. Richardson*[1]

> There can be no doubt that our Nation has had a long . . . history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism," which, in practical effect, put women not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, exactly 100 years ago, a distinguished member of this Court was able to proclaim (in *Bradwell v. Illinois*, 83 U.S. 130):
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> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, or interests and means which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

Illustrating the recent change, the Supreme Court in *Frontiero* decided that all distinctions based on sex are suspect, that employers must justify distinctions. Inconvenience and added costs do not justify sex discrimination, unless business need is established.

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[1] 411 U.S. 677 (1973).

In *Reed v. Reed,*[2] the Supreme Court reiterated that:

> (a) (the) classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons shall be treated alike.
>
> . . . To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits is to make the very kind of arbitrary legilsative choice forbidden by the Equal Protection Clause. . . .

It is possible that juvenile delinquency and divorce increase when husband and wife are employed full-time. Nevertheless, employers cannot advance this rationale to justify sex discrimination without violating the fair employment laws and/or Constitution. Discrimination occurs because the male parent is hired, but not his wife. To escape responsibility for a sex discrimination charge, employers would have to refuse employment to male and female job applicants with children.

Along a similar vein, employers often allege added costs, such as rate of turnover, abuse of sick leave privileges, maternity leave, tardiness, geographic immobility, etc., to justify discrimination against women. While some of the reasons reflect employer bias, women may be less mobile than men and seek maternity leave. While adding to costs, the increases hardly fall into the category of "business necessity" and do not excuse the discrimination. This was the legal position, at least until 1974.

In *Schlesinger v. Ballard,*[3] the Supreme Court considered a sex distinction in the military under the Fifth Amendment. Because he was not promoted, an officer was discharged from the Navy as required by law. He claimed a constitutional violation because women officers who are not promoted can serve longer before being discharged. The lower court favored the plaintiff because, per *Frontiero,* there was insufficient justification for the disparate treatment. The Supreme Court reversed, noting the following:

1. There were separate promotion lines for male and female officers.
2. Male officers have more opportunity for promotion than female officers, the former serving at sea and in combat.

The dissenters could not find any legitimate purpose for the distinction, and the discharge constituted a violation of the equal protection clause. In fact, the dissenters could not find any relevant military purpose to the sex distinctions. The majority however found "business necessity" in the military.

Productivity and efficiency vary with individual employees. Employers can refuse to employ or discharge incompetent workers, but a claim that one sex is less competent than the other sex is unacceptable. For example, Title VII outlaws claims that women cannot make good carpenters or that women more efficiently serve passengers aboard a plane than men. Also, employers can no longer claim that men will not work for women supervisors. If resenting female supervision, employers can force male employees to toe the line. However, if a female supervisor disliking male employees tolerates discrimination against men, employers are open to a charge of sex discrimination.

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[2] 404 U.S. 71 (1971).

[3] 9 FEP Cases 33 (1975).

Employers have been unwilling to hire female employees in certain jobs or on night shifts, complying with state laws. Starting in the late nineteenth century, a wave of state laws forbidding night work, lifting more than 30 pounds, limiting hours of work, and requiring rest periods and restrooms were enacted to protect the weaker sex. This type of law was enacted in all states except Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Missouri, Montana, Nebraska, New Jersey, North Carolina, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming. All of these state laws appear to be unconstitutional or preempted by the federal Title VII.[4]

A review will now be made of the federal and state legislation that can be used to reach sex discrimination.

The Wagner and Taft-Hartley Acts

Technological change, female uprising, and investigations spotlighted the need for fair employment legislation to end sex discrimination. Legislation initiated during the 1930s, liberal court interpretation, and state fair employment laws outlawing racial and religious discrimination pointed to the route finally taken by Congress in the Civil Rights Act of 1964. Male antagonism toward women in industry was not based upon hostility, such as toward the black, but upon a perception, however false, of the proper role of women. However, the end result was similar.

The 1935 Wagner Act encouraged union growth and collective bargaining, and many women joined unions; it was easy enough for men and women to point to employer exploitation of labor, creating a similarity of interest. Women in the needle trades and elsewhere felt strongly that organization was their only salvation. Union organization typically had been based upon the skilled craft, which automatically barred women, but the trend toward industrial organization, where all levels of skill join the same union, opened the door to increased membership after 1935. Unions barring or restricting women pushed for equal pay for equal work, a boon for women, even though the purpose was to whet the employers' appetite for male labor. Perhaps it was not realistic to expect union leaders to fight for sexual equality given the extent of unemployment and their fight for survival during the 1930s. Probably more accurately, union leaders did not see the need to push for equality of job opportunity, given the traditional role of women.

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[4] Rosenfield v. So. Pac., 3 FEP Cases 604 (CA 9, 1971); Sail'er Inn, Inc. v. Kirby, 3 FEP Cases 550 (Calif. Supreme Ct., 1971); Case No. DC 70382, 2 FEP Cases 338 (1969); Caterpillar Tractor Co. v. Grabiec, 2 FEP Cases 945 (U.S.D.C., So. Ill., 1970); LeBlanc v. So. Bell Tel. Co., 3 FEP Cases 1083 (U.S.D.C., E. La., 1971); Garneau v. Raytheon Co., 3 FEP Cases 215 (U.S.D.C., Mass., 1971); Commonwealth v. Burke, 4 FEP Cases 756 (Ky. Ct. Appeals, 1972); Jones Metal Products Co. v. Walker, 4 FEP Cases 483 (Ohio Supreme Ct., 1972); Richards v. Griffith Rubber Mills, 1 FEP Cases 837 (U.S.D.C., Oregon, 1969); Kober v. Westinghouse Electric Corp., 3 FEP Cases 326 (U.S.D.C., W. Pennsylvania, 1971).

A positive aspect of union organization not initially recognized was the spotlight placed on the benefits to be realized if women organized to achieve sexual equality. Women as yet did not take advantage of the ballet box or seek entré into politics to influence legislative changes. While men dominated the political parties, women were not considered acceptable candidates by the power brokers. Yet, women voters failed to take advantage of the American Federation of Labor strategy, "reward friends and punish enemies." Shortly after World War II, the legal climate shifted so that political parties were no longer treated as ordinary citizens but as extensions of government, subject to the equal protection requirement of the Fourteenth Amendment.[5] If political party conventions had to open representation to blacks, women, constitutionally entitled to suffrage, had to be granted the same rights. While not considered by the Supreme Court as extensions of government in the same manner as political parties, unions exercised significant economic and political power after the enactment of the Wagner Act. Bargaining with unions over wages, hours, and conditions of work, employers entered into agreements limiting their unilateral control over employees while increasing union control over hiring, promotion, layoff, union security, and the grievance process. The concept slowly developed by the NLRB and courts required fair representation of all employees in the bargaining unit, members and nonmembers. Unions engaged in obvious, but legal, discrimination against women by denying membership or segregating locals. Collective bargaining agreements were negotiated which protected male members and job seekers via the hiring hall, department seniority, etc. While these agreements may not have violated the Fifth Amendment, there being no direct government involvement, the Taft-Hartley Act required fair representation for women in the bargaining unit. However, women seldom claimed unfair representation or bargaining before the NLRB. Union representation could have been challenged, thereby forcing organized pressure on employers to end sex discrimination.[6]

The organization of male employees was probably helpful to female job-holders, even those who did not join unions. Employers not wishing to bargain with unions could raise wages and improve other benefits, admittedly illegal, thereby assuring employee votes against union representation. At least some women benefited from union organizational drives and collective bargaining even though they did not join unions or were unfairly represented.

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[5] Terry v. Adams, 345 U.S. 461 (1953).

[6] U.S. Bakery Co., 165 NLRB 951 (1967); Cuneo Eastern Press, Inc., 106 NLRB 343 (1953); Pacific Maritime Assn., 209 NLRB No. 88 (1974).

While unions representing blue collar workers did not think in terms of equal opportunities and wages for men and women, most women held white collar jobs where union representation was limited. In terms of sex discrimination in white collar employment, employers were solely responsible, absent union representation. In fact, employers and unions probably shared equal responsibility for much of the discrimination in blue collar jobs. It also seems fair to conclude that women infrequently invoked the protection due them under the Taft-Hartley Act.

The Fair Labor Standards Act

The growth of union power did benefit women. Unions, to protect male jobs, pushed for minimum wage laws, ultimately leading to the passage of the Fair Labor Standards Act in 1938. Employers operating in the stream of commerce and not excluded from coverage could not pay less than the minimum wage, beneficial to women holding low paying jobs, and time-and-a-half over 40 hours per week was required.

The Equal Pay Act of 1963 amended the Fair Labor Standards Act, requiring equal pay for equal work, a goal long sought by organized labor. Unions promoting this legislation were not only interested in raising the wages of the low paid employees, but employers are less likely to hire women if required to pay equal wages. The law prohibits pay differentials for the same, or essentially the same, work, protecting women, children, minorities, and others facing employment discrimination. While the **Taft-Hartley** Act outlawed distinctions between union and nonunion employees by requiring fair representation, it did not protect unorganized employees not part of a bargaining unit. When the 1963 legislation was enacted, women were concentrated in the white collar occupations as sales, clerical, professional and technical workers, and in the blue collar force as manual and operative workers, largely unskilled.[7] However, supervisory employment was excluded from coverage under the 1963 legislation, which was limited to the protection of blue collar employment. The legislation was amended in 1972 to include professional, administrative, executive, and outside sales representatives, occupations typically unorganized. The

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[7] "Major Occupation Group of the Economically Active Population, by Sex: 1900 to 1950," U.S. Dept. of Labor, U.S. Bureau of Census, *Statistical Year Book 1960*, p. 74.

1972 amendment added little protection for women, Title VII already forbidding all sex discrimination irrespective of the type of job held. (The Taft-Hartley Act did not require employer bargaining over supervisors and others properly classified as managerial job-holders.) Furthermore, professional employees, another white collar category, are not particularly keen on union membership and representation even though protected by the Taft-Hartley Act.

The equal pay provisions of the Fair Labor Standards Act do not call for fair employment for women; however, women employees performing essentially the same work as men are entitled to the same pay. For example, an employer is apparently free to schedule overtime for male workers to the exclusion of women. If women do not work more than 40 hours, the equal pay provisions, apparently, are not violated. If women work more than 40 hours per week, they are entitled to time-and-a-half as specified in the Fair Labor Standards Act. If men are paid double time under a collective bargaining agreement, women working overtime are entitled to the same hourly rate, a denial resulting in a violation of the Equal Pay Act. Vacations with pay are usually treated as deferred wages earned in the past. Thus, the same vacation benefits must be granted under the Equal Pay Act to men and women holding the same jobs. Pensions are often considered as deferred wages, and it seems that the same benefits must be extended to male and female employees falling into the same employment categories.

Without Title VII it is possible that the equal pay provisions of the Fair Labor Standards Act would have affected negatively the employment of women, particularly in the better-paying and supervisory jobs. Many employers favor male employees in the skilled blue collar trades and supervisory positions. With a law only calling for equal pay, it seems that fewer women would be hired.

Unlike the Taft-Hartley Act, the equal pay provisions demand equal pay for all employees holding similar jobs. Title VII in this respect is similar to the Equal Pay Act, prohibiting sex discrimination in all jobs. However, if an employer bargained with a union representing supervisory employees and negotiated an agreement calling for less pay for women supervisors, the union and employer, not bargaining in good faith, violate sections 8 (a) (5) and 8 (b) (3) of the Taft-Hartley Act. The union also was subject to decertification because of unfair representation.

The equal pay provisions do not contain a definition of the meaning of equal work. Obviously, it is not possible to legislatively fix the meaning of equal work, although some congressional guidance is possible. The Department of Labor, the regulatory agency, and the courts are then relied upon to provide guidelines. Congress established a vague framework, outlawing wage discrimination in jobs requiring equal or nearly equal skill, effort, working conditions, responsibility, training, etc. To guard against the possibility of insignificant distinctions, Congress declared that pay, which includes fringe benefits, must be equal if the work performed is essentially the same. For example, men could not be paid more because they occasionally lift more than women, otherwise performing the same work. In essence, employers cannot make distinctions when the duties of the job are essentially the same.[8] The question to be answered in disputes of this type is whether the differences are substantial enough to warrant different rates of pay.

The equal pay legislation also holds unions responsible for pushing employers to illegally distinguish between jobs. Not only are unions made responsible, but the employers unwillingly agreeing to the distinction are also responsible. In plants where employers negotiate with many unions, the probability increases that work similar in nature, located in different departments, calls for different rates of pay. However, where the work is performed in different departments, employers and unions will probably be able to submit evidence to support pay differentials; a presumption may be proper that jobs in different departments are sufficiently dissimilar so as to justify pay differences.

Congress specifically authorized pay differentials that are geared to productivity, seniority, and merit systems. On a production line, productivity expectations are averaged, and it would be difficult to show that some employees are more productive than others. However, legitimate productivity differences are possible when several lines engage in the same work and one line is more productive. Seniority clauses in collective bargaining agreements are common and wage differentials based on time spent on the job, a reward for experience and loyalty, is legitimate under the amended Fair Labor Standards Act. However, under Title VII and the *Duke Power Co.* decision, a seniority agreement is illegal if discrimination of the past has a present impact. Because sex discrimination is as prevalent as race discrimination, few seniority agreements could withstand an attack under Title VII. Thus, whether the same approach would be taken under the Fair Labor Standards Act, nullifying the blanket protection extended by Congress to such agreements, is moot. Based upon the *Alexander-Gardner* decision, claimants in fact can pursue several remedies. Where unions bargain, pay increases based upon merit have disappeared. Employers fear merit increases because the starting point for the next round of wage bargaining will begin at that rate.

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[8] Schultz v. Wheaton Glass Co., 421 F. 2nd 259 (CA 3, 1970), *cert denied,* 398 U.S. 905 (1970).

The Wage and Hour Division in the Department of Labor is charged with enforcing the Fair Labor Standards Act, and the equal pay provisions. The basic approach of the Wage and Hour Division, like the EEOC administering Title VII, is one of persuasion and conciliation, settling most complaints in this fashion; few violations are taken to the federal district courts. The Wage and Hour Division, like the EEOC, can initiate an investigation without the submission of a complaint. To date, the bulk of the money damages awarded has gone to women with income slightly above the minimum provided for in the Fair Labor Standards Act.

The Supreme Court, in *Corning Glass Works v. Brennan*,[9] interpreted in 1974 the Equal Pay Act for the first time. When the employer added a night shift, only male inspectors were hired, the state law prohibiting the employment of women. The collective bargaining agreement called for added pay for night shift employees. Employers traditionally reward employees working the graveyard shift for the loss of family and social contact and other inconveniences. Later, the state law was modified to permit night work for women, a legislative change made before the Equal Pay Act, and the employer and union agreed to end differences in pay because of shift. The night shift was opened to women but the pay of the previously hired male night inspectors was red circled in the new employer union agreement.

While the concept of equal pay was simple, application, according to the Supreme Court, was difficult because of variable conditions of work and assignments. The Supreme Court in *Corning* found a violation of the equal pay provisions because of the red circle exception, the work performed by employees on the day and night shifts being the same. Social and family contacts are disturbed by night work, and sleep during the day is more frequently disrupted than during the night; in essence, the conditions of work differ for the two shifts even though the same work is done. Consequently, the Supreme Court did not rule out shift differentials under the Equal Pay Act. Rather, the employer violated the legislation by initially paying a higher rate to recruit male employees only for the night shift. Permitting women to work the night shift after the change in state law did not cure the equal pay violation when night rates for previously hired male employees are red circled, and women moving to the night shift are paid less. While sex differentials were legal before the Equal Pay Act and the state law at one time forbade hiring women on the night shift, continuing the present pay differences for those hired in the past constituted a violation.

It is apparent that the Supreme Court was following doctrine enunciated in *Duke Power Co.* while interpreting the Equal Pay Act. If discriminatory past practices have a current effect, there is a violation. In the absence of proof by the employer of "business necessity," a prima facie violation is established when rates of pay for male and female employees differ. Since sex discrimination complaints, which include pay differentials, can be brought under Title VII and *Duke Power* doctrine, it seems advisable to make a similar construction under the Equal Pay Act.

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[9] 9 FEP Cases 919.

Differentials based on shift are still permissible if men and women receive the same pay and fringe benefits, necessary to attract a night force. Under these circumstances, neither the Equal Pay Act nor Title VII is violated. A fair assumption is that women will be less willing than men to work the night shift, women usually maintaining a home, caring for children, fear, etc. But women must be given the choice of working on a shift paying more—the employer cannot assume that women will not gravitate to night work. Some plants are located in seedy neighborhoods where the crime rate is high, and women preferring night work fear for their safety. It is doubtful whether employers could be held responsible under the Equal Pay Act or Title VII if added protection is not provided for women on public streets. Protection in the street is a police function which employers are not required to assume. However, it is possible that the employer could be held responsible for not providing better lighting in its parking facilities. In a different vein, employer policy which favors men over women is suspect under either federal law, especially when the seniority system assures choice of shift.

Executive Order 11,375

While racial discrimination was forbidden in contracts negotiated by the federal government with private industry since 1942, it was not until 1968 when Executive Order 11,375 was issued forbidding sex discrimination by contractors and subcontractors holding government contracts. State universities receiving financial assistance from the federal government to construct buildings are also required to let contracts to firms which do not engage in sex discrimination.

Guidelines have been issued by the Department of Labor to implement Executive Order 11,375.[10] The guidelines call for the following:

1. An employer must fairly recruit and hire both sexes unless there is a BFOQ.
2. Employers and institutions must stipulate in writing that they do not practice sex discrimination.
3. All conditions of employment, such as wages, hours, facilities, fringe benefits, etc., must be equal.

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[10] BNA, *Fair Employment Practice Manual* 401: 231 (1970).

4. Distinctions cannot be made between married and unmarried employees unless applying to both sexes. Women with children cannot be barred unless men with children are denied employment.
5. Women cannot be barred from employment because of a lack of physical facilities, such as bathrooms and locker rooms.
6. State laws barring female employment cannot be followed by employers seeking federal contracts.
7. Women bearing children cannot be penalized, entitled to reasonable leaves of absence during and after pregnancy.
8. Employers must recruit affirmatively to fill jobs from which women had been excluded.

State and federal laws barring sex discrimination in employment can be used as remedies rather than Executive Order 11,375. However, the reach of Executive Order 11,375 is greater, affirmative recruiting required, than the state and federal fair employment legislation. Courts, after finding fair employment discrimination, can require the hiring of a specified number of women, similar to affirmative recruiting, while Executive Order 11,375 requires affirmative hiring as a condition of securing federal contracts. The fair employment decision cures illegal discrimination of the past and present, while there is no presumption of illegal hiring under an affirmative hiring clause.

To correct imbalance in the work force, affirmative action, essentially reverse discrimination when jobs are scarce, is necessary. To end past discrimination hindering present opportunities, affirmative action is considered necessary. Not undertaking affirmative action favors those benefiting from past discrimination (training on the job, seniority agreements, hiring halls, etc.). The line between reverse discrimination and affirmative action is thin—if males and females of equal ability pursue the same jobs, women can be favored under an affirmative hiring contract. Presumably, affirmative action is not pushed when women with more experience or talent are hired. Employers are not required to hire inferior female help under an affirmative action program. Yet, if preference is given to women over men essentially equally qualified, there is discrimination even if necessary to achieve balance in the work force. Furthermore, deciding whether candidates are equal, superior, or inferior is often little more than a calculated guess.

Employers have made some effort to integrate women into the work force at all levels of skill to meet affirmative action goals. Since 1971, an analysis of the composition of the work force of each government contractor is required so that plans can be formulated to correct imbalances. A timetable and numerical goal, as in the affirmative action programs to end racial discrimination, are also required.

State Laws

Many of the state laws ban sex discrimination in public and private employment, administered by the same agencies that are charged with ending racial and religious discrimination. Only Alabama, Arkansas, Georgia, Louisiana, Maine, Mississippi, North Dakota, Ohio, and Tennessee have not passed laws forbidding sex discrimination, while the laws in North Carolina and Texas apply only to public employment. The same administrative and legal procedures are followed in the state enacting fair employment legislation as those followed in race discrimination.

The "Sex Discrimination Guidelines," prepared by the Iowa Civil Rights Commission in 1972, call for few exceptions—BFOQ's are to be sparingly granted.[11] Unproven assumptions and stereotypes of women cannot be relied upon by employers, unions, and employment agencies to justify discriminatory practices. The attitudes of employees and desires of clients are irrelevant if sex discrimination results. Distinction between married and unmarried employees is forbidden as is discrimination because of pregnancy and children. And fringe benefits for male and female employees must be alike.

Title VII

A number of bills were introduced in Congress to reach sex discrimination in employment after World War II. Few of these bills reached the floor for debate, most dying in committee. Opponents of fair employment legislation claimed that race and sex discrimination pose different problems, requiring separate laws; women would be forced into the military if enacted; family structure and leadership would be destroyed; sex crimes would increase; a federal law would unnecessarily preempt and intrude upon state and local laws forbidding sex discrimination, an intrusion upon state rights; biological differences between men and women would make discrimination inevitable; outlawing sex discrimination would interfere with the more pressing need to end racial discrimination; black women would be protected by a ban on race discrimination; etc. It was evident that many of the objections raised were ill-founded, disclosing an unwillingness to change past customs and religious practices.

In spite of the social, political, and industrial changes, many clung to notions and stereotypes easily refuted. There are followers of Justice Frankfurter who cling strongly to the preservation of states' rights and limiting the role of the federal monster. These proponents of states' rights seem to be, at least to some degree, removed from reality. Limiting the federal role has advantages, but national defense, large corporations and unions, and economic considerations point to the inevitable growth of federal power at the expense of state rule. The expanded meaning of interstate commerce and the fact that states' rights advocates often engage in unsavory practices point to the unacceptability of these arguments.

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[11] BNA, *Fair Employment Practice Manual* 451:420-423.

Only one objection raised seems to merit consideration. Racial discrimination was widespread, condemning future generations to poverty and inferior education. Every avenue was closed to the black, male and female, fanned by a degree of hatred and irrationality never exhibited toward white women. While women in recent years constitute more than 50 percent of the total population, their contribution was in the home, to be supported by husbands. During a recession, such as that experienced in 1974, integrating blacks into the work force is more difficult than when labor is in demand. To pass legislation promoting equal employment opportunity for women and minorities leads to competition between two groups for a limited number of jobs. To deny women employment opportunity would be unjust, but the specter of continued racial discrimination is also disturbing.

The Title VII ban against sex discrimination was as broad as the ban against racial and religious discrimination, reaching employers, unions, and employment agencies. As in the racial discrimination complaints, the EEOC, if the evidence supports the charge, attempts conciliation, not empowered to make a binding decision. Where state laws outlaw sex discrimination, the state commissions are given first crack at solving the dispute. The EEOC or complainant can bring a suit in a federal district court if conciliation is unsatisfactory.

Because of the broad prohibition against sex discrimination, the EEOC and courts have played a considerable role in Title VII disputes, providing more specific answers. The EEOC regulations, however, are followed by the courts unless it is determined that congressional will is thwarted. The EEOC guidelines, revised in 1972,[12] contain the following admonitions:

1. Jobs cannot be advertised or designated as "male" or "female" in the absence of a BFOQ.
2. Married women cannot be barred from employment unless married men are similarly barred.
3. Fringe benefits, which include medical, hospital, accident, insurance, retirement, profit sharing, and bonus plans, must be the same for male and female employees. Some men have gained economically by this requirement.
4. Barring employment or benefits because of pregnancy.
5. BFOQs are to be granted sparingly, and cannot be based on the wishes of employees, customers, or stereotypes.

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[12] B.N.A. *Fair Employment Practice Manual*, 401:29. These guidelines are similar to those in effect under the Iowa fair employment law and the executive orders.

Obviously, the EEOC regulations, while more specific than Title VII, are not precise. Title VII and the EEOC regulations will now be reviewed in greater detail.

Section 703(e) permits discrimination in those instances where "sex . . . is a bona fide occupational qualification reasonably necessary to the operation of that particular business or enterprise. . . ." Obviously, opinions will differ as to what is "reasonably necessary to . . . that particular business." What may be reasonable in one industry may be unreasonable in another industry; in fact what may be reasonable in one firm may be unreasonable in a competing firm. It is clear that an employer could hire a male only to model male clothing or a female only to model female clothing. It is equally clear that a male or female could jerk sodas in an ice cream parlor, so that hiring one sex only would constitute a violation of Title VII.

While the federal law permits distinctions where "reasonably necessary," the EEOC has adopted a more stringent standard, permitting a BFOQ only if absolutely necessary. It seems that there is a difference between "reasonably necessary" and absolutely necessary. To further complicate the problem, the Supreme Court, considering the legitimacy of a company rule barring the hiring of women with children not yet in school, determined that the standard is whether "demonstrably more relevant" to job performance for women than men.[13] It can be reasoned that "demonstrably more relevant" is the same or close to the "reasonably necessary" standard established by Congress in section 703(e). However, the Supreme Court did not rule out the use of the EEOC absolutely necessary standard, and the EEOC did not modify its guideline. The rule in *Marietta* can be viewed as a compromise between the EEOC regulations and section 703(e), in fact a third guideline, i.e., what is "demonstrably more relevant" is not necessarily "reasonably necessary" or absolutely necessary. It will be difficult in fact under "demonstrably . . . relevant," "reasonably necessary," or absolutely necessary standards to justify discrimination against women with children.

Title VII provides little practical guidance when a BFOQ claim is made. The EEOC guidelines outlaw:

> (a)(1)(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that women are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics attributed to the group.
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> (a)(2) Where it is necessary for the purpose of authenticity or genuine-

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[13] Phillips v. Martin Marietta Corp. 3 FEP Cases 40 (1971). The case was sent back to the district court for a finding on this standard.

ness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.[14]

Reasons used in the past to refuse jobs to women, like danger (explosives), heavy work (mining), health (pregnancy), or morality (massage parlor) are not acceptable under Title VII. By the same token, jobs typically assigned to women, like flight stewardesses and public school teachers, must be opened to men. However, it seems likely that many "female" jobs will continue to be held by women if the pay scale is low. But more women will seek "male" jobs where pay scales are higher.

It is unlikely that an employer could establish a BFOQ for his entire business; the cosmetic industry which, until recently, served women only, is an example. While the employer in cosmetics could probably claim entitlement to a BFOQ, hiring a woman only to demonstrate cosmetics, all jobs in the firm need not be filled by women. Nor could a magazine titillating the tastes of one sex claim a BFOQ for the entire firm. Cliff hangers unquestionably arise when a job is considered for a BFOQ. Congress intended to wipe out sex stereotypes used in the past to determine employment, and the EEOC guidelines and court rulings are in tune with this goal. Employers are no longer entitled to assume that men or women are not interested in certain jobs because they are considered feminine, physical, or what have you.

Courts in general agree with the EEOC that BFOQs are to be granted sparingly.[15] Based on *Marietta*, if an employer can show statistically that women with children are absent more frequently than men with children, a BFOQ may be in order. *Marietta* permits pulling away from the EEOC concept that women are to be evaluated individually and not as members of a large group. Evidently, with statistical data to support the employer, sex discrimination is not based on a "stereotype." *Duke Power Co.* supports the notion that valid statistical data can lead to a BFOQ.

However, it will be difficult for employers to secure statistical data that women with children are less efficient or reliable employees. It seems that women cannot be inefficient merely because of children. What is claimed is that they are less reliable, late for work or absent because of children. Since women typically excuse tardiness or absence for reasons of transportation, illness, etc., it will be difficult for employers to link an inefficiency allegation to children in the home.

The employer claiming a BFOQ must present satisfactory evidence to support his defense.[16] Claims that women are physically incapable of lifting 100-pound sacks all day long must be supported by statistically sound evidence. Based on *Marietta,* even if a few could lift 100-pound sacks, employers presenting satisfactory statistical data could refuse to hire women without looking to individual capability, as called for in the EEOC guidelines. Employers will find it difficult to support claims for BFOQs since satisfactory evidence, as required in *Ablemarle Paper Co.,* is often unavailable. Admittedly, it is less difficult to establish physical capabilities than the relevancy of tests.

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[14] B.N.A., *Fair Employment Practice Manual*, 401:29.

[15] Rosenfield v. So. Pac. Co., 293 F. Supp. 1219 (C.D. Calif., 1968); Bowie v. Colgate-Palmolive Co., 416 2d 711 (CA 7, 1969).

The EEOC, per section 1604.4, exhibits uncertainty where employers bar the employment of married women but not married men. As stated by the EEOC:

> (a) . . . It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor . . . such application involves a discrimination based on sex.
>
> (b) It may be that under certain circumstances, such a rule could be justified. . . . We express no opinion on this question at this time except to point out that sex as a . . . (BFOQ) must be justified in terms of the particular job. . . .

Should employers refuse to hire married traveling salesmen, male or female, an unlikely standard, sex discrimination cannot be established. But the employment of married men, but not women, as traveling salesmen indicates a Title VII violation. While employers claim that wives must care for children, husbands have assumed greater responsibility than in the past. Yet, *Marietta* points to the reason for the uncertainty of the EEOC. While a refusal to hire women with young children is suspect, the Supreme Court permits a BFOQ if evidence is produced showing that women caring for children are less reliable than men. In a changing society, women still assume greater responsibility for the rearing of children than men, but not from choice. To bar women seeking to forego responsibility for the raising of children smacks of male chauvinism.

Collective bargaining agreements provide for such fringe benefits as hospitalization and other medical benefit coverage, life insurance, and pensions. In fact, many employers who do not bargain with unions provide these fringes. The fringe benefits are viewed as additional wage costs that employers would like to limit. Providing maternity benefits for firms employing many young women is costly, and male employees cannot seek maternity leaves of absence with or without pay. Employers today claim that maternity is not an illness, so that Title VII is not violated if female employees are denied hospitalization benefits (or leaves of absence). However, the EEOC in section 1604.10 provides:

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[16] Weeks v. So. Bell Tel. and Tel. Co., 1 FEP Cases 656 (CA 5, 1969); Bowie v. Colgate-Palmolive Co., 2 FEP Cases 121 (CA 7, 1969); Diaz v. Pan American World Airways, 3 FEP Cases 337 (CA 5, 1971), *cert. denied,* 3 FEP Cases 1218 (1971).

> (a) A . . . practice which excludes from employment applicants because of pregnancy is in prima facie violation of Title VII.
>
> (b) Disabilities caused . . . by pregnancy, miscarriage, abortion, childbirth, and recovery are . . . temporary disabilities and should be treated as such under any . . . insurance or sick leave plan. . . . Written and unwritten employment policies . . . involving . . . the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits . . . under any . . . insurance or sick leave plan . . . shall be applied to disability due to pregnancy . . . on the same . . . conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

Section 1604.10 (c) seems to be drawn from the Supreme Court decision in *Duke Power Co.;* even if the discrimination is unintentional, the employer, in the absence of "business necessity," violates Title VII. The Supreme Court did not define "business necessity" and fringe benefits, which are an additional overhead, may fall short of this concept if the added costs are slight. If women are granted paid leave and are less likely to return to work after giving birth to a child, a BFOQ may be in order if established by statistical data. In such a situation, a claim can be made that the BFOQ does not constitute sex discrimination but a distinction between women with and without young children. If the costs are significant, there is a greater likelihood that the "business necessity" defense will be legally acceptable.

Lower courts interpret the maternity benefit guidelines differently. One court has ruled that pregnancy cannot be equated with illness, so that maternity benefits can be denied without violating Title VII.[17] Other courts feel that maternity benefits cannot be withheld, constituting sex discrimination.[18]

The Supreme Court has not ruled on the legality of denying maternity benefits under Title VII, but a California law denying maternity benefits until 28 days after giving birth was considered in *Geduldig v. Aiello* under the Fourteenth Amendment.[19] The extent to which the *Geduldig* decision is applicable in Title VII complaints is a matter of conjecture, the Supreme Court carefully restricting the application of its decision. Deciding that the additional costs of providing maternal benefits would be small, the lower court found a violation of the equal protection clause of the Fourteenth Amendment, that there was sex discrimination. The Supreme Court upheld the constitutionality of the California legislation because the insurance coverage was actuarially geared to contributions made only by employees of private employers not covered by the workmen's compensation laws. The Supreme Court concluded that the costs of providing maternity benefits would be substantial, possibly requiring state support, increased contributions from employees, or the reduction of other benefits. Presumably the Supreme Court would have followed the lower court decision if the additional costs would not be substantial. The Supreme Court noted that the Constitution does not require insurance protection for all contingencies, so long as the exclusion is not unfair. Women, according to the Supreme Court, were treated fairly—only maternity coverage is denied. That only female employees were denied maternity benefits was, evidently, inconsequential. While the Supreme Court was unable to uncover evidence of intentional discrimination, the effect of excluding maternal benefits is sexual in nature; evidence of intentional discrimination is not required to invoke the Fourteenth Amendment. Arbitrary, capricious, or unreasonable class distinctions constitute a violation. Singling out pregnant women can be classified as capricious unless the costs of providing maternity benefits increase appreciably. Disability benefits for male-related conditions could have been scaled down to provide some coverage for pregnant women, or male-related illness could have been barred to establish an evenhanded approach. The fact that coverage for disabilities peculiar to the male was not exempted is some evidence of discrimination.

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[17] Newmon v. Delta Airlines, 7 FEP Cases 26 (D.C., N. Ga., 1973).

[18] Gilbert v. General Elec. Co., 7 FEP Cases 796 (U.S.D.C., E. Va., 1974); Wetzel v. Liberty Mutual, 7 FEP Cases 271 (U.S.D.C., W. Pa., 1974).

[19] 8 FEP Cases 97 (1974). This decision is reprinted in part.

In a dissenting opinion, Justice Brennan felt that:

> by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard. . . . In effect, one set of rules is applied to females and another to males.

Justice Brennan felt that Title VII[20] and section 1604.10 of the EEOC regulations forbid this type of sex distinction. *Geduldig* pertains to Fourteenth Amendment guarantees; consequently, the Title VII comment by Justice Brennan is dictum.

It seems that the majority opinion in *Geduldig* was limited to a construction of the Fourteenth Amendment and, perhaps even more significant, to situations in which employees, and not employers, pay the insurance premiums. A *Geduldig*-type situation could arise under Title VII, state employees entitled to coverage since 1972. The Supreme Court was obviously aware of the potential applicability to Title VII; the dissenting opinion by Justice Brennan is testimony thereto. Yet, the Supreme Court in *Duke Power* stated that "business necessity" was one exception to the rule enunciated therein. Adding substantial cost to an insurance program could fall within the concept of "business necessity" and excuse employer responsibility under Title VII. *Marietta*, in line with *Duke Power*, stands for the proposition that denying pregnancy benefits is not discriminatory if the cost increase is appreciable.

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[20] Wetzel v. Liberty Mutual Ins. Co., 7 FEP Cases 34 (D.C., W. Pa., 1974); Gilbert v. General Elec. Co., 7 FEP Cases 796 (D.C., E. Va., 1974). For contrary opinion, see *Newmon v. Delta Airlines,* 7 FEP Cases 26 (D.C., N. Ga., 1973).

Another troublesome factor in *Geduldig* was the conclusion reached by the Supreme Court that the cost of providing maternity benefits would be substantial. It is difficult to pinpoint what costs are necessary to be considered substantial. Should the added dollars be determinative, a quantitative substantiality test, as used in antitrust decisions,[21] could be applied, or the added dollars could be weighed as a percentage of the total hospital insurance costs. The conclusion that maternity benefits would substantially increase costs seems farfetched, especially since benefits payable for male-related illness could be reduced or discontinued. In *Geduldig*, the employees bore the hospitalization costs, and whether the additional costs were evaluated quantitatively or percentagewise was not mentioned.

Pregnancy benefits have been considered under the due process clause of the Fourteenth Amendment, women required to take leaves of absence without pay.[22] The school boards involved required women to take a leave of absence four or five months before the birth of their child. The Supreme Court found a Fourteenth Amendment violation, the policy founded upon a conclusive presumption that women five months pregnant are physically incapable of teaching. Not only are pregnant women able to continue after five or more months of pregnancy, but the degree of incapacity varies with the individual teacher. In fact, some women are more seriously effected because of morning sickness arising at an early stage of pregnancy that subsequently disappears. But there is a denial of due process because an arbitrary rule is laid down not supported by reason.

The Supreme Court did not rule out an arbitrary but more reasonable standard, such as requiring pregnant employees to take leaves of absence at the beginning of the eighth month or one giving the employees a number of choices. Furthermore, standards are more reasonable if leaves of absence with pay are required. School boards requiring leaves without pay after five months seem to follow the Victorian notion that pregnant women should not be in contact with children of tender age.

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[21] Standard Oil Co. of Calif. v. U.S., 337 U.S. 293 (1949).

[22] Cleveland Bd. of Educ. v. LaFleur, 6 FEP Cases 1253 (Sup. Ct., 1974). For a similar decision involving the denial of unemployment compensation because of pregnancy, see *Turner v. Dept. of Employment Security*, 11 FEP Cases 721 (Sup. Ct., 1975).

The school boards in *LaFleur* argued that uniformity was necessary to assure effective administration, impossible if pregnant employees decided when to take leaves of absence. While the Supreme Court did not question the need for efficient administration, the mandatory leave policies were unreasonable, not geared to satisfactory performance in the classroom or health of teachers. Evidently, the defendants did not present evidence to justify a "business necessity" position.

The Supreme Court also took a pot shot at rules requiring women teachers to absent themselves from the classroom until their children were three months or older. Whether fit to return to the classroom in less than three months has to be individually determined to comply with the due process clause. It seems that the Fourteenth Amendment and Title VII necessitate looking at the individual in most instances, prohibiting the establishment of general standards in the absence of acceptable statistical data. However, because of the need to hire substitute teachers, it was proper to forbid returning to the classroom until the semester after the birth of the child. In this instance, the defendants were able to establish "business necessity."

In *Robinson v. Rand*,[23] a female in the Air Force was discharged, in accordance with regulations, after becoming pregnant. This Air Force rule applied to married and unmarried women, and the plaintiff claimed an infringement of her Fifth Amendment rights. The court felt that the rule applying to married and unmarried women was discriminatory, a denial of equal protection, forcing her to choose between a military career and motherhood. The plaintiff was billeted in a combat zone, and a reasonable solution would require her transfer to a noncombat area rather than discharge.

The Supreme Court in *LaFleur* considered the due process clause and not the equal protection clause of the Fourteenth Amendment. However, it seems that the same decision would be reached under either clause as well as Title VII. An employer in a Title VII case would claim entitlement to a BFOQ, which raises the same questions of sex discrimination as raised constitutionally; there seems to be overlap between reasonable standards in the public sector and BFOQ claims. Decisions made under established standards rather than individual capacity raise constitutional questions of due process and equal protection, in fact intertwined. The *Geduldig* decision favoring the public employer arose under the equal protection clause, and it is difficult to support a position that there would be sex discrimination if a denial of due process were claimed, as in *LaFleur*. Rather, it seems that the equal protection and due process clauses outlaw unwarranted sex discrimination and *Geduldig* protects the state when employees, and not employers, pay for the insurance costs. To evaluate *Geduldig* in any other fashion points to Supreme Court inconsistency or reversal of the path established in *Marietta* and *LaFleur*.

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[23] 340 F. Supp. 37 (1972).

The *LaFleur* rationale is in step with the decision made in *Marietta* under Title VII. The cost of medical benefits to the employers in *LaFleur* and *Marietta* would increase; whether the increase would be substantial, as stated by the Supreme Court in *Geduldig*, is another possible distinction between these decisions. Perhaps the public and private employers in *La Fleur* and *Marietta* would not incur substantial costs so that *Geduldig* is reconcilable. *Geduldig* requires further Supreme Court clarification in the light of *Marietta*, *LaFleur*, and Title VII.

Marietta and *LaFleur* follow section 1604.10 of the EEOC regulations. It seems prudent to assume that *Geduldig* is an isolated decision, an answer to special and unusual circumstances, so that section 1604.10 is not challenged in Title VII disputes. Otherwise, a large loophole is opened in Title VII permitting sex discrimination. *Geduldig* in a Title VII case allows employers to limit or deny pregnancy benefits, an exception that appears to contradict the will of Congress. Yet, *Geduldig* and *Marietta* point to the possibility that standards set by employers to reduce large insurance costs for pregnant employees are judicially acceptable. If true, the EEOC regulations, which apparently prohibit all sex distinctions, even those that are costly, would fall by the wayside.

Today, more men and women live together without consummating a formal marriage. Employers who enforce policy banning the employment of men and women "living in sin" do not violate Title VII, both sexes accorded equal treatment. (Such a ban also poses constitutional problems in the public sector.) While there may be some constitutional question of whether employers can impose standards invading the privacy of employees, Title VII only calls for the equal treatment of both sexes. It would seem that Title VII does not outlaw employer rules intruding upon the privacy of employees, touching upon aspects of their lives that do not affect firms. However, if women "live in sin," resulting in discharge, while men negotiating the same relationship are not discharged, Title VII would be violated, an unjustified distinction between the sexes.[24] Society has always been more tolerant of male than female "sin."

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[24] Dec. No. 71-2678, 4 FEP Cases 24 (1971).

Unwed mothers experience difficulty in our society while males are not held equally responsible. Employers have penalized unwed employees whose pregnancy is evident.[25] Puritans in colonial America whipped, imprisoned, or ostracized unwed mothers. New Jersey, in 1967, charged pregnant and unmarried women with the crime of fornication. Public assistance has been denied to mothers bearing illegitimate children, sometimes leading to imprisonment for refusing sterilization. Today, punishment heaped upon unmarried mothers tends to be of a private rather than public nature. Employers punishing unwed female employees do not consider themselves discriminators, but protectors of public morality, unfairly overlooking the male role. The birth of illegitimate children should increase since more parents refuse to marry. Drugs or contraceptives limiting birth have been available for a long time and illegitimate children in the past were usually born to the poor and uneducated, usually women between 15 and 24 years of age. Mothers in high school were forced to discontinue their education, which limited their ability to find employment. Employers refusing employment to unwed mothers are today guilty of sex discrimination under Title VII. Based on the effect doctrine in *Duke Power Co.*, employers claiming that male and female are accorded equal treatment could be held responsible, the economic punishment of women being more likely than the economic punishment of men. Thus, the employer claiming equal treatment of both sexes would bear the burden of proof.

Some employers claim that unwed mothers are immature and irresponsible, needlessly absent from work, show a greater turnover rate, and generally add to costs. If employers are able to statistically verify these claims, presumably they would not be guilty of discrimination. But verifying these claims would be statistically difficult, and the rationale expressed in *Duke Power Co.* would control unless "business necessity" is established by employers.

While more illegitimate children are born in the black community, the percentage differential between black and white communities is narrowing. Based upon *Duke Power Co.*, the effect of denying employment to black mothers with illegitimate children would constitute race and sex discrimination.[26] The EEOC has noted that 80 percent of all illegitimate children are nonwhite. The guidelines covering sex discrimination in Iowa[27] do not refer to unwed mothers, but are otherwise similar to the EEOC section 1604.10. Presumably state and federal laws would be violated by employers refusing to hire or promote women with illegitimate children.

In one controversy, the unwed plaintiff, five months pregnant, was hired without informing the employer of her condition.[28] Discovering the pregnancy, the employer fired the employee, granting two months severance pay. While maternity leave was granted, the employer justified the discharge as protection of its public image and punishment for not disclosing the pregnancy when hired. The district court ruled for the plaintiff because the employer did not submit evidence to show that its reputation was or would be damaged; the burden of proof is upon the employer who claims "business necessity." Even the failure to notify the employer of the pregnancy—inadvertence or deception—did not justify discharge under Title VII.

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[25] Dec. No. 71-332, 2 FEP Cases 1016 (1970).

[26] Robinson v. Rand, 9 FEP Cases 1266 (D.C. Colo., 1972).

[27] *BNA, Fair Employment Practice Manual,* 451-422, Section 4.10.

Some companies adopt dress and grooming regulations, which may signify sex discrimination. Some employers prohibit pant suits, mini-skirts, hot pants, African hairdos, etc. Some employers claim that women meeting the public must be "properly" dressed to maintain goodwill, a "business necessity" argument, or that cleanliness or safety requires regulation. If cleanliness is essential, like wearing hats or nets when handling food, employers are not guilty of discrimination if male and female employees are treated alike. Should men, but not women, sporting long hair be required to wear a net, Title VII would be violated. Where food is packaged, "business necessity" requires these precautions, but disparate treatment of sex is unwarranted.

Few jobs require the regulation of dress to assure safety, and few women are found in such jobs. Employers have regulated dress in offices, based evidently on notions of propriety, and to prevent the arousal of prurient interests. Freedom of dress for women is a major factor in today's styling and "puritan" dress codes are mainly of the past. Yet, some clothing is considered less tasteful and more offensive to customers than others. Employers have objected to mini-skirts and bra-less women. While short dress has been accepted in industry, the bra-less woman is still an object to be ogled, offensive to customers and disrupting productivity.

Based on *Duke Power*, employers could probably penalize bra-less women without violating Title VII because male employees are not permitted to wear clothing that flaunts their sex. To protect goodwill and efficiency, employers prohibiting the wearing of attire acceptable in the nightclub probably do not violate Title VII. But some employers resist change, prohibiting slacks, pant suits, etc. Women in slacks and pant suits are seen everywhere without arousing prurient interests or offending customers. Victorian rules of dress, unnecessarily restrictive, are signs of sex discrimination. However, acceptable dress in one geographic area may be considered taboo elsewhere, which complicates the problem for decision-makers interpreting Title VII. Perhaps worthy of note is that women (and men) holding management positions are not style setters; in fact, most wear traditional clothing. Title VII does not mention the control of dress.

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[28] Jane Doe v. Osteopathic Hosp. of Wichita, Kan., 3 FEP Cases 1128 (U.S.D.C., D. Kan., 1971).

Employer interest in dress is unquestionably greater than union interest. Union constitutions and bylaws may call for expulsion or lesser punishment of members for "conduct unbecoming a union member." The meaning of "conduct unbecoming a union member" is speculative, varying with the union and the charged member. If membership is denied or taken away because of improper dress, can women claim a violation of Title VII? While unions could claim that improper dress tarnished their reputations—an unlikely event—"business necessity" could not be established. Punishing women for improper dress is probably a sign of union discrimination where male members are unregulated. Unless presenting evidence that male members are punished, female punishment by unions would violate Title VII.

Male employees expected to wear "proper" clothing by their employers can also claim sex discrimination. Financial institutions and the professions, for example, expect employees to dress conservatively and "rainbow tastes" are unacceptable. The same institutions grant more leeway to women, permitting more colorful attire. The issue remains however whether male employees disciplined for colorful dress can claim sex discrimination if women dressing more colorfully are not chastised.

Men wearing long hair, especially the pony tail, have been economically punished by employers and unions. Women grow long hair or sport pony tails without criticism, possibly an indication of an unwarranted sex standard. Employers charged with violating Title VII use a "business necessity" rationale, that customers are offended by men with long hair. Per *Duke Power*, employers should submit evidence of damage or possible damage, which may be difficult. The problem may be more acute where black men or women sport Afros or braided hair, employer discipline possibly constituting signs of racial and sexual discrimination.

The direction that will be taken under Title VII when dress is regulated is not clear. EEOC regulation 1604.2 limits BFOQs and the courts have not yet provided clear direction. In *Boyce v. Safeway Stores, Inc.*,[29] the employer discharged an employee with long hair and a beard who served customers. The court felt that different dress regulations for male and female employees are permitted if reasonable. Consequently, the male employee was fairly treated even though women could wear long hair and could not sport beards. Evidently, employers can be more restrictive if employees are in contact with customers.

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[29] 5 FEP Cases 285 (U.S.D.C., D.C., 1972). Also see *Baker v. Calif. Land Title Co.*, 5 FEP Cases 329 (U.S.D.C., Calif., 1972).

There are other points of view. A newspaper publisher refused to hire a male with long hair as a display artist.[30] While not claiming "business necessity," the employers felt justified because the job required contact with the public, that long hair is associated with drug abuse. The appellate court sent the case back to the trial court to determine whether the possible public reaction to long hair justified a BFOQ. In *Safeway Stores Co.*, the employer was permitted to establish reasonable grooming regulations without ascertaining the public reaction to long hair and a beard.

Perhaps sex discrimination should be forbidden only when there are genetic differences. Hair length is easily changed and is not a genetic difference. Consequently, regulating the length of hair for the male only violates Title VII.

Arbitrators have also been called upon to decide questions of grooming violations. While not required to follow Title VII, some arbitrators claim that hair regulation is unreasonable, especially if employee contact with the public is limited.[31] But many arbitrators feel that employees regularly contacting the public are properly regulated by reasonable codes.[32]

Questions of moral propriety are raised when employees engage in profanity. Profanity in the plant is commonplace, but dual standards of conduct are also commonplace. Women are expected not to use profanity, while male employees are expected to contain themselves in the presence of women. But profanity is used by men and women in all walks of life—Ivy League schools, fashionable schools for women, corporate boards, banks, sewers, military officers, and in the White House, as evidenced by the Nixon tapes. This facade of propriety, dual standards geared to sex, is unreasonable where only women are penalized for profane speech. As signs of liberation and independence, men and women use profanity in mixed company. Employers punishing women for profane language tolerated in male company violate Title VII unless men are also required to follow the same standards.

The EEOC regulations prohibit separate jobs for men and women unless a BFOQ is warranted. Theoretically, the Miami Dolphins would have to recruit and hire women as professional football players. It seems that women are entitled to a tryout unless a BFOQ is in order. This extreme example is not offered facetiously, but as possible illustration of what the legislation requires. Perhaps a BFOQ is in order—physical contact with male football players could result in serious injury for women. In fact, could the Miami Dolphins be held responsible for injury to a female because women are not as strong as men? Would women assume the risk or is management negligent by permitting a tryout? Because of the nature of the game, a BFOQ seems proper. However, women should not be barred from employment as jockeys or automobile racing where stamina is a factor rather than brute strength.

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[30] Wellingham v. Macon Tel. Pub. Co., 5 FEP Cases 1329 (CA 5, 1973). See *Fagan v. National Cash Register Co.*, 5 FEP Cases 1335 (C.A., D.C., 1973).

[31] Dravo-Doyle Co., 54 L.A. 604C (1970); Economy Super Mart, 54 L.A. 816 (1970); A & P Co., 57 L.A. 7(1971); United Parcel, Inc., 60 L.A. 147 (1973).

[32] United Parcel Service, Inc. 51 L.A. 292 (1968); Safeway Trails, Inc., 57 L.A. 994 (1971); Western Air Lines, Inc., 60 L.A. 546 (1973); Allied Employers, Inc., 55 L.A. 1020 (1970).

The same fringe benefits and opportunities must be provided for all employees. In the past, women could retire at an earlier age than male employees. Today, such a policy or agreement violates Title VII, constituting discrimination against male employees. Not only is there sex discrimination, but there is also a violation of the age discrimination laws.[33] Section 1604.9 of the EEOC regulations define fringe benefits as "medical, hospital, accident, life insurance and retirement benefits" and "other terms, conditions, and privileges of employment." Expressly prohibited are the granting of economic benefits to the "principal wage earner" for his family or "to make available benefits for the wives of male employees which are not made available for husbands of female employees." If life insurance benefits are available to wives of deceased employees, male spouses of deceased female employees must be granted the same protection.

In *Frontiero*, the Supreme Court outlawed benefits to wives of servicemen that were not made available on the same terms to husbands of servicewomen, a violation of the Fifth Amendment. In this case, husbands of servicewomen could not claim benefits unless one-half or more of their support came from their wives. The Supreme Court seemed to take the position that sex differentials are difficult to justify under the Fifth Amendment. Yet, in *Geduldig*, the Supreme Court could not find a Fourteenth Amendment violation where insurance coverage was not extended to pregnant employees. Reconciling *Frontiero* and *Geduldig* is not simple. Further clarification will be necessary by the Supreme Court.

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[33] For a more detailed discussion of retirement benefits, see Chapter 13.

AGE DISCRIMINATION

Chapter XIII

AGE DISCRIMINATION

The Statistical Picture

The number of residents in 1970 between 45 through 64 years of age has been increasing in every state, 1.9 percent in South Dakota to 45.2 percent in Alaska. In Iowa, a small increase, 3.0 percent, was registered; the male increase was 1.4 percent while the female increase was 4.6 percent. In Florida and California, the increase in older residents was substantial. The female increase was greater than the male increase in all states. In Iowa, 578,500, or 20.5 percent of the total population, are between 45 and 64 years of age; the national average per state is 20.6 percent. The recent legislative push to end age discrimination is beneficial to widows who outlive husbands and find it necessary or desirable to work.

In Alabama, Arkansas, Mississippi, Montana, North Dakota, South Dakota, Tennessee, West Virginia, and Wyoming, blacks between the ages of 45 and 64 decreased, while increases were registered in all other states. Black people in this age range not only face racial discrimination but experience difficulty finding employment because of their age and lack of education.

Over 37 million people in the United States are between 40 and 64 years of age, a little less than one-half of the working force over 16 years of age. By 1990, 47 million people will fall into this age category. While many between 40 and 64 years of age are protected by seniority clauses, company policies, and pension plans, those unemployed experience greater difficulty finding suitable employment than younger job seekers. Age discrimination and government interest in full employment necessitated the passage of legislation to protect older workers experiencing difficulty. Surveys made by the National Association of Manufacturers and the United States Chamber of Commerce disclose that 26 percent of the firms polled refused to hire job seekers over 45 years of age. More than 1,000,000 of the unemployed were over 45 years of age in 1970. Between 1969 and 1971, prosperous years with little unemployment as compared to 1974 and 1975, unemployment for those over 45 nearly doubled. There is a good possibility that many more would classify themselves as unemployed even though they elected or were forced to retire.

Employers economically justifying discrimination against those over 40 years of age allege that:

1. Chronologic age is an accurate measure of physiologic aging and inefficiency.
2. Younger people are easier and less costly to train and motivate than older people.
3. Younger workers are more likely to accept lower pay than older workers.
4. Pension, health, and insurance costs mount as the age of workers increase.
5. Most collective bargaining agreements contain seniority clauses controlling layoff and promotion, protecting older employees and leading to age imbalance in the plant. To provide balance in the work force, employers should be able to hire younger workers without challenge.
6. Young executives are not comfortable directing older workers.

There is little reason to bar, for physical reasons, older workers in jobs that do not require considerable physical exertion. If labor is in demand, employers hire older workers with little or no evidence of damage to productivity. More women over 40 years of age seek employment, increasing the available supply of labor. The legislative attempts to minimize age, racial, and sex discrimination create conflicting goals—older workers, black and white, and women compete for the same jobs, particularly white collar jobs, when there is an abundant supply of labor.

Businessmen, in the name of efficiency, seek to establish uniform conditions of work and policies, a depersonalization of the employment relationship, relieving them of the burden of making individual decisions. Employment standards are often set without considering the social responsibilities of the firm. In a limited fashion, the age laws force employers to evaluate the individual rather than allowing, without substantiation, blanket decisions prohibiting the employment of job seekers over 40 years of age. While probability data, like the incidence of heart disease and cancer, is medically useful, employers seldom can establish a need to deny employment if older employeers are currently fit.

Age as a Barometer of Adaptability and Health

Employers frequently assert, without proof, that older workers are more difficult to train and less adaptable than younger workers. While some undergo personality changes, the changes in older workers have little or no effect on their overall efficiency. Employers could, under the age laws, rely upon personality tests to determine whether older workers can satisfactorily fill a particular job. For example, aging employees become less interested in pursuing activities necessitating social contacts. For salesmen, this type of character change could effect efficiency. Yet, public contact is unimportant in most jobs and personality changes should not affect performance even for salesmen.

Little is known about the validity of personality and psychological tests for industrial use. For this reason, industrial attempts to validate personality and psychological tests are suspect. Due to physical changes, education, and fear, older people often see tests as a threat, and may perform less satisfactorily than younger people. Personality and psychological tests tend to be used most frequently for management, professional, and other responsible jobs. While the *Duke Power Co.* decision was an interpretation of Title VII, it seems reasonable to assume that a similar approach toward testing will be taken under the age discrimination laws. Tests that are not validated and checked periodically for reliability can unfairly discriminate against middle aged people.

Some personality tests reflect the bias of employers since norms are not designated. Many psychologists feel that personality tests are improperly used by employers because there are no right or wrong answers. Age does not seriously erode mental capacities even though EEG diagnostic tests suggest that there are electrical changes in the brain.

Intelligence tests may also unfairly measure older workers with less schooling who are further removed in time from school than younger workers. It is possible that these tests measure acquired knowledge and the ability to take tests rather than intelligence. Unless an intelligence test accurately measures motivation and ability to learn, test scores are not accurate predictors of success.

While cases have not arisen under the state and federal age laws, the propriety of denying promotion where there is a seniority clause because of poor performance on a test has gone to arbitration.[1] Without mentioning the federal law, the arbitrator ruled in favor of the employer promoting a worker with less seniority. The arbitrator did not question the validity of the aptitude test and his decision cannot be questioned in court under section 301 of the Taft-Hartley Act. In fact, arbitrators, per *Denver-Gardner*, are not required to take into account or follow federal law. It should be mentioned that older workers are less troubled by intelligence, verbal, numerical, and space perception tests than by finger and dexterity tests. The scientific soundness of performance tests is less difficult to establish than other types of tests. While younger workers spend more years in school than older workers, it is possible that intelligence and aptitude tests can be developed that allow for educational differences.

There is evidence that productivity declines somewhat after 45 years of age, followed by a substantial decrease after 60 years of age. However, the overall performance of workers from 45 to 60 years of age compares favorably with that of younger workers; individual differences in occupation, physical condition, and motivation affect productivity and efficiency. If older workers find it more difficult than younger workers to find employment, the former should be highly motivated to succeed.

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[1] North American Refractories Co. v. Brick Workers Union, 68-1 CCH Lab. Arb. Awards 3732 (1968).

As people age, they are more likely to experience certain types of illness such as heart attack, cancer, kidney disease, cerebrovascular disease, diabetes mellitus, and others. Physiologic functions that often decline with age include the basal metabolic rate, vital capacity, maximal breathing capacity, renal blood flow and others, but these dysfunctions are not always attributable to physiologic aging. The external environment—disease, food, occupational hazards, and others—may accelerate or stem physiologic aging; in short, chronologic age does not always reflect physiologic age. Furthermore, it is difficult to assess the impact of a disease on the person and his capacity for work. Depending on the occupation and person, a disease may not in any way affect the functional capacity of the individual worker. Physicians can differ in their assessment of the impact of a disease on employability; even the basic diagnosis may differ between physicians. A specific disease is often difficult to identify, and an evaluation of its impact on working capacity is even more difficult, given the present state of medical knowledge.

The exact cause of aging is not known, although a number of theories have been advanced. All the explanations may be epiphenomena, not related to one another, but related to a single as yet unknown factor.

Aging may be directly attributable to genetic factors. There is a characteristic maximum life-span for each animal species, and the causes of death, for example, are more likely to be similar in monozygotic than dizygotic twins. There is an increased occurrence of chromosomal breaks and aneuploidy in human cells in human patients of advanced ages; certain strains of rats with decreased life-spans exhibit increased numbers of chromosomal aberrations as compared to rats with normal life-spans. Some findings support a theory that aging is due to a series of random "hits," occurring with a constant probability per unit of time, resulting in the inactivation of certain genes. The lack of gene activity, singly or in combination, could be lethal. A related theory links the characteristic life span of a species to the stability of its DNA. Altered expression of histocompatability antigens has been potentially linked to aging phenomena. Many biochemical abnormalities, perhaps related to these defects in genetic material, are currently being identified.

Another interesting concept of age-related mortality and morbidity implicates the different mitotic capabilities of different human cell lines. Human cells can be divided into three groups based on replication characteristics—continuous replicators, discontinuous replicators, and nonreplicators. Many epithelial and hematopoietic cells are examples of continuous replicators, i.e., cells which continue to divide throughout life, replenishing their DNA content by replication. Discontinuous replicators do not, generally, turn over at a rapid rate in an adult, unless provoked by stimuli injurious to health. Some examples are liver, bone, and renal tubular cells. Nonreplicator cells, for the purpose of this presentation, do not reproduce themselves in kind in an adult organism. These cell lines include muscle, renal glomeruli, and nerve cells; they apparently have a life cycle that is without cellular replication, and the DNA content is not renewed. Cell death may occur as a result of DNA falling below a critical level. Though these nonreplicators do not generally reproduce themselves in kind, there is evidence that other methods of DNA renewal may be operative. There is experimental evidence for repair of cellular DNA (not by cellular replication) after damage is caused by ultraviolet and x-ray irradiation. DNA renewal might be accomplished without cell division.

Of importance to those concerned with discrimination is the increasing mean age of men and women. When life-spans averaged 30 years, the limitations on survival of the organism imposed by nonreplicating cell lines may have been negligible. As mean life expectancy increases, more time is allowed for the development of progressive diseases, such as arteriosclerosis, to cause irreversible damage to nonreplicating cells. On an evolutionary scale, these stresses appear to be new, at least in a mass sense, and adaptations for the renewal of the nonreplicating cells have not yet evolved. Multiple genetic loci might act in concert to determine the aging rate. Some genes could prolong life in one environment while shortening life elsewhere. Phenotypic, genotypic, cellular, and biochemical concomitants of aging may all proceed at different rates under different conditions.

Another aging theory involves the immune system wherein "senescent" changes may begin to take place at adolescence. The activity of the humoral immune system, as gauged by its antibody synthesizing capacity, has been reported to increase exponentially during neonatal and juvenile life, reach a peak during young adulthood, and gradually decrease thereafter. This drop in synthetic capacity occurs before most old-age-associated illnesses are clinically manifest. This synthetic inadequacy may be due to a decrease in the number of immunocompetent units, a deficiency of a humoral factor essential for the growth of lymphohematopoietic cells, and alterations of the architecture. Conflicting data exist with respect to trends in immunoglobulin levels in aging individuals, and differential trends in immunoglobulin classes may exist.

Delayed hypersensitivity is impaired in the aged. This type of immunity is mediated by a cellular system, largely lymphocytes, involved with such phenomena as transplant rejection. "Memory" lymphocytes may remain competent, but the ability to respond to new antigens via delayed hypersensitivity is impaired with age. Consistent with this concept is the observation that the skin test response to 2,4-dinitrochlorobenzene is diminished with increasing age, while tuberculin skin test reactivity remains unimpaired. The ability of cultured human lymphocytes to divide in response to certain stimuli in vitro is diminished in aging subjects. T-lymphocytes, responsible for mediating delayed hypersensitivity, may be present in reduced proportions relative to B-lymphocytes, responsible for humoral antibody production in older human beings.

The frequency of positive serum measurements of immune responses directed against one's own tissues ("autoimmunity") seems to increase with age. Many elderly patients demonstrate measurable circulating antinuclear antibody activity, usually directed against nuclear antigens other than DNA, which cannot be explained by the presence of a specific causal disease. Environmental factors, such as food or bacteria, may have a role in provoking autoimmune reactions with advancing age.

A related immunologic concept has been advanced that aging is due to an increasing attack on tissues by "forbidden clones" of lymphocytes. The theorists hold that these clones are present throughout life, with the intrinsic suppression of the clones becoming less effective with advancing age. The "autoimmune" and "genetic" theories of aging may be integrated—as spontaneous genetic alterations increase, body cells and tissues undergo an increasing number of self-rejection reactions and biochemical aberrations which lead to progressive aging. Combinations of genetic and immune concepts are currently the most popular in aging theory.

A third theory of aging, free radical reactions, involves numerous chemical reactions often deleterious to the body. Free radicals are molecules which are generally physically unstable and found throughout the biologic system. Free radicals may cause structural aberrations in the long-lived macromolecules, such as DNA and collagen, affecting the progress of the aging process. Free radicals may also trigger the formation of lipofuscin, one of the "aging pigments."

A fourth theory of aging relates to collagen maturation. Collagen is the most abundant fibrous component of human connective tissue, the primary structural component of the body. A major difference between young and old collagen appears to be the increased cross-linking between elemental collagen molecules with increasing age. This may be due to a continuous maturation process rather than an age-induced deterioration alteration, i.e., connective tissue may become more and more rigid with advancing age from collagen cross-linking, impeding mechanical movement and molecular nutrient shifts.

The theories reviewed are no more than theories and would not stand up in a court to justify age discrimination because of physical or mental infirmity. Given the present state of scientific knowledge, it would be difficult to be certain that any age-associated biological change is due to a primary aging process. Rather, it would seem that body functions are affected by years and diverse, often unrecognized, circumstances. The etiology of many disabilities associated with age, including cardiac, malignant, cerebrovascular, neuromuscular, arthritic, and other diseases may be both genetic and environmental, induced by a combination of frequently unknown factors, pursuing an individually unpredictable clinical course. Before aging is better understood, more will have to be known about environmental and intricate biological factors and their control.

Reaching the practical world of employment, particularly the 40 to 65 age group, there are better predictors of morbidity and mortality than age. Take coronary heart disease as an example. Data indicate that males in the United States have a 20 percent chance of developing clinical coronary heart disease, in all probability a myocardial infarction, before reaching 60 years of age. Those persons recovering from the initial myocardial infarction face a greater possibility of death within the following five years, approximately five times greater than persons never experiencing an infarction. Men are more likely to experience a heart attack than women, although the incidence in women is increasing. The aging process per se may not be a major factor in the etiology of heart disease. The practical aspects are that only physicians can determine whether older employees and heart patients are employable, which is what the age laws are designed to accomplish.

The incidence of carcinoma increases with age, but it is unlikely that the increase is related to age alone. Some of the common cancer types—epithelial (skin and lung) seem to increase rapidly with age. Other cancer types—such as acute lymphoblastic leukemia, bone tumors, and testicular tumors—have characteristic peak age incident rates and are not more frequent with advancing age. An increase in cancer frequency with age could be due to a long exposure to certain carcinogens and impaired immunity due to advancing age. Not only is carcinoma linked to age and environment, but genetic factors may play an etiologic role in certain instances. There are more than 100 known forms of cancer, and each patient may react differently, both mentally and physically. Environment increases the probability of some cancer (e.g., cigarette smoking and lung cancer) so that age alone does not determine the rate of incidence. In any event, the increased probability of cancer with advancing age does not justify a BFOQ. However, if diagnosed, the employer may be legally entitled to refuse employment to the victim.

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Here again, not all cancer victims are incapable of satisfactorily holding a job.

Those with cancer may be difficult to protect under the age discrimination laws as well as the health discrimination laws discussed in the next chapter. Employers are not necessarily guilty of age discrimination by refusing employment to those with cancer. However, there is a possibility of invoking the protection of the state health laws calling for fair employment. Because of the different forms cancer takes and the individual responses, employers are more likely to be held responsible for violating the health laws, where the question is one of individual ability to perform satisfactorily, than the age laws. To make the federal age law more effective, Congress should consider an amendment prohibiting health discrimination.

Rheumatoid arthritis is a disability more common to women than men, resulting in remitting and relapsing inflammation of multiple joints, the incidence rate increasing with age. Though feared by laymen, it infrequently totally physically incapacitates victims. Assorted therapies and medicines can aid the afflicted, and most can function effectively on the job. Since it is more common to women than men, women with rheumatoid arthritis seeking employment or promotion after 40 years of age are especially helped by the age and health protection laws.

The data available indicate that the cost of providing hospital benefits increases only slightly with age. Since the added costs, if any, are small—for example, Blue Cross rates are geared to exprience in the community—employers cannot refuse to hire older workers. And age does not increase the probability of accident even though heart, circulatory, rheumatoid, and other diseases increase statistically with age.

In 1973, the Health Maintenance Organization Act was made the law of the land, designed to encourage the development of prepaid health plans.[2] The organizations providing prepaid medical care, operating like insurance companies, could not function effectively because of state laws requiring the maintenance of reserve funds, expenditure restrictions, rate limitations, etc. Even if pushed by unions via collective bargaining, a fringe benefit, it is doubtful whether the cost of a prepaid health care plan would be sufficiently large to justify refusals to hire older employees.

State and Federal Age Laws

State Laws

Currently, Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, and Wisconsin prohibit age discrimination in employment. While Colorado was the first state, in 1903, to outlaw age discrimination by criminal statute, few states passed similar laws. Massachusetts enacted the first state law, in 1950, providing for administrative control. Today, only Colorado, Georgia, Illinois, Louisiana, and North Dakota allow misdemeanor charges; age discrimination in other states is regulated by an administrative agency. Alaska, Hawaii, Iowa, Maine, Maryland, Nevada, New Hampshire, and New Mexico prohibit all age discrimination in employment. The impact of such laws for those under 18 and over 65 years of age is uncertain. Most states outlaw discrimination between 40 and 65 years of age. In Georgia, Hawaii, Idaho, Louisiana, Nebraska, New Jersey, New Mexico, and North Dakota, only discrimination by private employers is banned (however, unreasonable age discrimination by state employers can be reached under the Fourteenth Amendment).[3] Most states prohibit age discrimination by private and public employers, unions, and employment agencies, outlawing unfair hiring, training, and promotion.

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[2] P.L. No. 93-22 (12-29-73), 87 Stat. 914.

The Iowa law, which is typical, exempts from coverage employers with fewer than four employees, employees of spouse, parent or child, domestic help in the home, and religious institutions. However, the Iowa law differs from most state laws because all age discrimination is banned.

In addition, Iowa and the other states allow age discrimination if entitled to a BFOQ or a bona fide retirement or seniority plan exists. Entitlement to a BFOQ is determined by the nature of the job, the age group barred from employment and the public interest.[4]

Federal Regulation

President Johnson issued Executive Order 11,411 in 1964, decreeing that contractors and subcontractors "shall not in connection with the employment, advancement, or discharge of employees, or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement. . . ." Few complaints have been registered with the contracting federal agencies administering Executive Order 11,411.

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[3] Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971); Barry v. Flint Fire Dept., 205 N.W. 2d 627 (Mich. App., 1973); Pierce v. Fort Wayne Bd., 292 N.W. 2d 857 (Ind. App., 1973); McIlvaine v. Penn. State Police, 309 A. 2d 801 (Pa., 1973).

[4] These decisions were made under the federal age discrimination law. See *Hodgson v. Tamiami Trail Tours,* 4 FEP Cases 728 (S.D. Fla. 1972); *Hodgson v. Greyhound Bus Lines,* 7 FEP Cases 817 (CA 7, 1974), *cert. denied,* 7 FEP Cases 817 (1975).

Congress, while debating the passage of the Civil Rights Act of 1964, considered banning age discrimination. However, Congress decided that additional investigation was desirable and section 715 of Title VII directed the Secretary of Labor to conduct a study. The report prepared under the auspices of the Secretary of Labor was completed in 1965 and considerable evidence of age discrimination was uncovered, leading to a federal law in 1967. While some favored assigning jurisdiction to the EEOC, the Wage and Hour Division of the Department of Labor was designated as the administering agency. Thus, the age discrimination law is administered by the same agency, and in the same fashion, as the Fair Labor Standards Act and the amending Equal Pay Act.

The federal legislation, section 636 (b), permits states with similar regulatory laws to adjudicate complaints where the accused operates in interstate commerce. In fact, it appears that federal relief cannot be requested unless state help is first sought.[5] However, the complainant is entitled to pursue a federal remedy if displeased with the state decision. The federal law prohibits the quest for a judicial remedy until "the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. . . ." The federal law only authorizes the Wage and Hour Division to conciliate while most states delegate authority to commissions to conciliate and make binding decisions. Before pressing charges in a federal district court, the Wage and Hour Division is required to undertake conciliation.

The federal law since 1974 covers employers in interstate commerce hiring 20 or more employees, state and federal civil service employees, unions and employment agencies; similar coverage is provided under the state laws. Excluded from coverage are employers with less than 20 employees and elected or appointed officials to public office. Age discrimination is permitted if there is a bona fide pension or insurance plan unless advanced as an "excuse . . . (not) to *hire* any individual." The added costs of insurance and pension benefits do not excuse refusals to hire employees between 40 and 65 years of age, but "bona fide" reductions in insurance and pension benefits may be legitimate. Most collective bargaining agreements contain a seniority clause, to be used for promotion, layoff, choice of shift, etc., and contractual discrimination favoring long-time employees is permissible if "bona fide." A seniority clause favors older employees working continuously for the same employer and is in line with state and federal policy.

The Wage and Hour Division undertakes conciliation if private employers or a state agency are accused of age discrimination. Federal employees must petition the Civil Service Commission for relief before seeking help in a federal district court. Either the Secretary of Labor or the complainant can bring suit; if suit is brought by the Secretary of Labor, the complainant cannot sue subsequently. The Secretary of Labor seeks an injunction to end age discrimination while the complainant can claim damages and injunctive relief.

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[5] McGarvey v. Merck & Co., 359 F. Supp. 525 (D.N.J., 1973).

If claiming entitlement to a BFOQ, employers bear the burden of proof and exceptions are to be made sparingly. Per *Duke Power Co.*, a BFOQ is in order if age is an important factor, to be determined by the nature of the business and the duties of the job.

The courts have not yet faced situations in which a physical disability, say coronary disease, impairs productivity and employers refuse to shift employees to less taxing jobs or redesign the present job, if possible. Refusals to shift or redesign jobs may constitute violations of the age laws (and health laws later reviewed). In fact, forced early retirement would be unnecessary for some older employees if this were done. Few employers have protected older employees by redesigning jobs or shifting them to less demanding jobs. It is perhaps unrealistic for employers to consider such changes in the face of mounting unemployment. For purposes of interpreting the age laws, it seems that employers refusing to hire, promote, or reassign employees with diagnosed medical conditions are not discriminating because of age. Where medical conditions have been diagnosed, employees are more likely to establish a violation of the health discrimination laws than the age laws.

The courts, for the most part, have implemented the legislative goals forbidding age discrimination. Except where the public interest is direct and tangible, employers have been required to prove entitlement to a BFOQ after a prima facie case is established. Excuses of the past—the job is only suitable for the young, need to train young people for the future, young executives are uncomfortable with older employees, etc.—would not take the defendant off the hook.[6]

Two appellate courts have already approved BFOQs for bus carriers refusing to hire drivers over 35 and 40 years of age. While the evidence, medical and otherwise, was not conclusive and there was some question whether the employers established entitlement to a BFOQ, the courts accepted the arguments made by carriers because of the public nature and responsibility of the industry. As stated in *Greyhound*:

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[6] Hodgson v. Sugar Cane Growers, 346 F. Supp. 132 (S.D. Fla., 1973); Hodgson v. Earnest Mach. Products, 479 F. 2d 1133 (CA 6, 1973); Billingsley v. Service Technology Corps, 6 FEP Cases 404 (S.D. Texas, 1973); Schulz v. Hickock Mfg. Co., 358 F. Supp. 1208 (N.D. Ga., 1973); Hodgson v. Career Counsellors, 5 FEP Cases 129 (CA 5, 1972); Hodgson v. Greyhound Lines, 7 FEP Cases 817 (CA 7, 1974); Hodgson v. Tamiami Trail Tours, 4 FEP Cases 728 (S.D. Fla., 1972).

> Greyhound need only demonstrate . . . a minimal increase in risk of harm (to passengers) . . . to show that elimination of the hiring policy might jeopardize the life of one or more person(s) that might occur under the present hiring system.

Evidently, the burden of establishing a BFOQ is less in industries serving the public. *Greyhound,* to this extent, seems to create an exception to the general rule enunciated in *Duke Power Co.*

It seems that similar BFOQs will be permitted for aircraft pilots, firemen, policemen, etc.

Pension plans frequently augment social security retirement pay. Most collective bargaining agreements require retirement at 65 years of age although some require earlier retirement with reduced benefits. Should unemployment increase, pension plans may be changed to require or permit earlier retirement, at the option of employers. If employees have the right to retire at an earlier age, discrimination cannot be claimed and the retirement plan remains "bona fide." But forced retirement before 65 years of age to "save" younger employees is suspect. Such factors as whether the plans are unilaterally established by employers or negotiated with unions, age of compulsory retirement, exceptions permitted, benefits paid, etc., may affect the legitimacy of the retirement plan.

Some retirement plans permitted earlier retirement for female than male employees. These differentials have disappeared, since they violated the sex discrimination prohibitions of Title VII. There is a need to reconcile the federal age discrimination law with Title VII because of actuarial differences between male and female employees. The average male does not live as long as the average female—there is an eight-year difference—and the costs to employers are greater for female pensioners unless their benefits are reduced or contributions increased. If employers reduce benefits for female retirees, it is possible that Title VII is violated unless the added costs are substantial, as in *Geduldig.* On the other hand, "bona fide" retirement plans are expressly exempted under the age laws and variable benefits between male and female, supported by statistical data, seem "bona fide." Section 4 (a)(1) and (2) of the federal age law does not prohibit retirement plans geared to sex if "bona fide" differences at the hiring and promotion stages are established

The age and sex discrimination retirement provisions should be similarly interpreted; a plan is not "bona fide" under the age and sex laws unless there are significant differences in pension cost between male and female retirees.

The Federal Aviation Agency (FAA) requires commercial pilots to retire at 60 years of age. The FAA selected 60 because medical data and public interest requires an earlier retirement age for pilots than in other jobs. As previously noted, there is considerable impairment of the body at 60 years of age. The judiciary has approved compulsory retirement at 60 even though the individual pilot may be physically fit.[7] This decision was not made under an age discrimination law, but it does not appear likely that this would change the outcome. There may be greater reluctance on the part of judges to question judgments made by public agencies composed of members theoretically selected for expertise who do not make self-serving decisions. Where private firms singly or in consort with unions fix the retirement age, the burden of establishing a "bona fide" plan less than 65 may be greater. In fact, the burden may be even greater where retirement plans are established unilaterally by employers.

Compulsory retirement prior to 65 years of age is in fact "bona fide" under state and federal law, depending upon reasonableness and timing. The Social Security Act permits retirement at 62 years, and collective bargaining agreements, requiring retirement at this age, appear to be "bona fide" in the absence of unusual circumstances. In fact, a compulsory retirement plan at 60 is probably "bona fide." Where economic retrenchment is essential and retirement at 60 years of age is required, there is a likelihood that the age laws are violated, the timing indicating discrimination.[8] If retirement is optional at 60, age discrimination cannot be claimed.

As a rule of thumb, the younger the compulsory retirement age, the greater the likelihood of discrimination. For example, forcing retirement at 50 smacks of age discrimination even for airline pilots.

In *Murgia v. Mass. Board of Retirement*,[9] a police officer with 20 years of service was forced to retire at age 50 pursuant to the state law. The plaintiff claimed that the law was unreasonable and, hence, unconstitutional. Unlike an airline pilot forced to retire at 60, the plaintiff was younger and holding a job where physical demand and responsibility for immediate safety were less. A rational basis for the law was not established, and the courts found it unconstitutional. It seems unlikely that such a retirement policy would be "bona fide" under the federal and state age discrimination laws. Collective bargaining agreements are renegotiated, and retirement benefits change, indicating that future changes in attitudes, social and judicial, may lead to the acceptance of earlier retirement ages as "bona fide." The fact that more married women work than ever before may require earlier retirement in order to spread the available work.

If benefits are grossly inadequate or if unemployment should continue at a high rate for a few more years, the "bona fide" quality of a newly initiated compulsory retirement plan is suspect, particularly when uniform policy is not followed.[10] Decisions have not been reported where the inadequacy of benefits or reduction in costs have been labeled signs of discrimination. Some managerial employees are entitled to exercise favorable stock options and compulsory retirement ends their claims thereto. Employees forced to retire before 62 years of age who are not entitled to Social Security benefits are more likely to claim age discrimination than those over 62. Employees have accepted early retirement without complaint when Social Security benefits are available in the near future or other employment is found. As the inflationary spiral continues and unemployment mounts, it is reasonable to assume that forced retirement before 62 years of age will be contested more frequently.

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[7] Air Line Pilots Assn. v. Quesada, 286 F. 2d 319 (CA 2, 1961), *cert. denied*, 366 U.S., 962 (1961).

[8] Stringfellow v. Monsanto Chemical Co., 320 F. Supp. 1175 (W.D. Ark., 1970).

[9] 8 FEP Cases 18 (D. Mass., 1974), 10 FEP Cases 1003 (D. Mass., 1974), *affirmed*, 10 FEP Cases 1056 (Sup. Ct., 1975).

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[10] Walker Mfg. Co. v. Wisc. Ind. Com., 59 L.R.R.M. 2454, 2457 (1965); Barry v. Flint Fire Dept., 83 L.R.R.M. 2173 (Mich. Ct. of Appeals, Div. 2, 1973); McIlvaine v. Penn. State Police, 5 FEP Cases 198 (Pa. 1972); Retails Clerks Union, Local 770 v. Retail Clerks Int'l Ass'n, 5 FEP Cases 1131 (U.S.D.C. C.D. Calif., 1973).

HEALTH DISCRIMINATION

Chapter XIV

THE HEALTH DISCRIMINATION LAWS

Nature of the Problem

The handicapped have faced hardship in ancient and modern societies, economic burdens to family and society. The Greeks and Romans believed that evil spirits led to defects at birth; consequently, the deformed and crippled were murdered or ridiculed. As herein discussed, the handicapped include not only the deformed and maimed, but those who are physically and mentally troubled by assorted ailments. Considerable evidence has been accumulated pointing to industrial underutilization and prejudice toward the physically and mentally disadvantaged, many of whom are suitable for employment and upgrading. During World War II, given the labor shortage, society and industry were forced to use the handicapped and training programs were undertaken and placement efforts intensified. There is no evidence that the handicapped in industry did not perform well. Aided by pharmaceuticals and other medical innovations, handicapped people live longer and are less troubled by their disabilities than in the past. For example, manic depressives can function effectively when sedated with lithium. Approximately 50 percent of the epileptic population are fully controlled by drugs, free of seizure. Those who are not fully controlled can satisfactorily fill many jobs, experiencing warnings before an attack (aura), or wear a device which warns them of an oncoming attack, wear helmets protecting them from head injuries due to falls, etc.

In addition, technological changes in the factory and the services demanded have radically altered the nature of the work force, so that even the handicapped can perform efficiently. Greater concern has been exhibited since World War II over humanitarian rather than industrial needs, emphasizing human worth and dignity, social judgments holding far-reaching implications for the handicapped. Few employers take the trouble to evaluate the handicapped individual or look at the nature of the job. The few employers hiring handicapped workers in menial jobs are publicly acclaimed and awarded citations. Most corporations ignore or limit the use of the handicapped, citing safety, inefficiency, lack of transportation, working conditions, absenteeism, increased insurance costs, inclement weather, and other reasons to justify their position.

Educators, public officials, and others claim that many handicapped people are employable because:

1. Minor adjustments can be made in blue and white collar jobs, permitting employment. Other handicapped workers are capable of holding jobs without changes in working conditions. The big increase since World War II in white collar jobs minimizes the significance of handicaps and disabilities.
2. The handicapped are not accident prone because they are placed with greater care than others and tend to be more cautious. Should accidents occur, 46 states have amended their workmen's compensation laws, protecting employers through the second injury funds. The purpose of these amendments was to induce employers to hire the handicapped by setting aside funds to cover subsequent payments to them for injuries on the job leading to the loss of use of arms, legs, eyes, etc.

   No evidence has been produced to support employer claims that the disabled add to the costs of providing medical and hospitalization insurance.

   While employees injured on the job can bypass the workmen's compensation statutes and sue employers for negligence, the common law defenses, contributory negligence, assumption of the risk, and fellow servant rule, continue to protect employers, making it difficult for plaintiffs to win. It seems that employers will be entitled to rely on the fellow servant rule as a defense even if a handicapped employee injures another employee. If the handicapped worker is able to do the job and does not add to the risks of fellow employees, employers can defend in court by citing the fellow servant rule, especially since the new health laws later reviewed require fair employment.
3. Employers are not required to provide reliable transportation to work; the handicapped must arrange suitable transportation. Some handicapped people cannot use public transportation, or it may be unavailable. Inclement weather could cause difficulty, but, typically, even those who are not handicapped experience transportation difficulties.
4. Psychologically, handicapped workers have a greater need to establish their efficiency and reliability than others. In fact, the handicapped are less likely to be absent from work than others. The evidence cited to establish reliability may prove misleading if those considered to be handicapped are broadly defined, as under the new state health discrimination laws reviewed later.
5. The turnover rate for handicapped workers is low, often unable to find other employment opportunities.

The recent legislative attempts to provide opportunities are testimonials to the conclusion that the handicapped are employable and promotable. These laws force employers to evaluate the job and individual, allowing BFOQs only if supported by reasonable evidence. The burden of proof has been shifted, legislatively, to employers to justify discrimination against the handicapped, a distinct departure from past practices. The laws forbidding age discrimination can be dovetailed with the laws forbidding health discrimination, since the incidence rate of many disabilities increases with age. With advancing age, disabilities can become increasingly disabling.

It has been estimated that 14 million physically handicapped citizens face employment discrimination. An additional 12 million people suffer from chronic diseases, limiting their activities, but are capable of holding jobs. The number suffering from chronic disability has been increasing as people live longer, necessitating occupational shifts, protected by the laws prohibiting age and health discrimination. Those unable to hold jobs or limiting their activities are men and women usually over 45 years of age. While suffering increasingly from age-related disabilities, married people tend to live longer than unmarried people.

The major diseases and disabilities requiring the limitation of activities have been heart conditions and hypertension; arthritis and rheumatism; back, spine, leg, and hip conditions; asthma and hay fever; eye; and mental conditions. Cardiovascular and heart disease is the most common cause of death. With age, the heart tends to function less efficiently because of fatty deposits, cholesterol, and inefficient valves. Age affects the brain, causing shrinkage due to the loss of fluids and irreplaceable neurons, and leads to pre-senile dementia. In addition, age affects skin, hair, and muscle tone, which in turn damages morale and mental outlook. Cancer attacks the older worker; women experience a higher incidence rate of breast and reproductive region cancer than men. There is a higher incidence of lung cancer among cigarette smokers than nonsmokers. Mental disorders increase with age due to physiological factors and social pressures, causing temporary or permanent damage.

State and federal agencies encouraged employment of the handicapped without the aid of fair employment legislation. Vocational training was provided by state and federal agencies and the handicapped were employed in sheltered workshops. To this day, the sheltered workshop is the only feasible solution for the severely handicapped. As fair employment legislation spreads, programs conducted for the handicapped able to work outside the sheltered workshop need revamping to include training for occupations previously considered off-base.

Federal Legislation

Section 13(a)(7) of the Equal Pay Act permits employers to pay handicapped workers, defined as those suffering impairment due to age or physical or mental injury, less than the minimum wage provided in the Fair Labor Standards Act. By acquiring a special certificate from a state agency, an exception is permitted. Employers are not required to hire the handicapped, presumably less efficient than others, but an inducement was provided since a lower pay rate was permitted. A lower pay rate was evidently illegal if the handicapped worker was as efficient as other workers. It is doubtful whether the Wage and Hour Division did much to protect handicapped workers paid less than the minimum wage who were capable of earning full pay.

To determine whether a lesser wage rate is justified, the Wage and Hour Division was required to evaluate the job and the individual—physical and mental disability did not necessarily mean less satisfactory performance. Pursuant to section 525.17 "(n)othing . . . shall be construed as authorizing any act that is contrary to any Federal or State law or municipal ordinance." This savings clause protects the state health laws, which could conceivably conflict with the Equal Pay Act, from federal preemption. Where state laws have been enacted protecting the handicapped, there is a likelihood that the lowering of the wage rate, as permitted by the Equal Pay Act, constitutes a violation of fair employment legislation.

Title VII of the Civil Rights Act of 1964 does not prohibit employment discrimination against the handicapped. However, Congress in 1973 (amended in 1974) enacted the Vocational Rehabilitation Act to encourage employment of the handicapped.[1] Taking a cue from the executive orders calling for the affirmative hiring of those facing race and sex discrimination, the act demands that all employers, contractors, and subcontractors, holding federal contracts in excess of $2,500 hire affirmatively. In addition, those holding contracts in excess of $50,000 and hiring 50 or more employees, must prepare affirmative action programs. The legislative call for affirmative action initially required employers to seek out and promote those trained in approved state programs; hiring handicapped workers not undergoing approved training would not have, apparently, satisfied the 1973 call for affirmative hiring.[2] But the 1974 amendment prohibits employer discrimination against the handicapped who have not undergone approved training.[3] In addition, the 1974 change enlarged the meaning of "handicapped" to include impairments which substantially hinder the ability to earn a living.

Section 7(12) of the act defines "severe handicap" as disabilities requiring "multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction, and any other disability specified by the Secretary (of Labor). . . ." To be classified as severely handicapped, there must be, at the outset, "multiple services over an extended period of time." Consequently, the protection extended by the federal legislation is more limited in reach than the state law's prohibiting health discrimination, the state laws unconcerned with "severe handicap." Evidently, "multiple services" must be "extended (over a) period of time" to be eligible for protection, a limitation not found in the state legislation. Timetables and goals are not specified.

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[1] P. L. 93-112, 93rd Cong. (1973), *amended*, P. L. 93-516 (1974).

[2] Section 503(a).

[3] Section 504. Also see E.S.A., U.S. Dept. of Labor, *Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers* (9-3-75).

Title I of the 1973 legislation provides federal aid to states operating approved rehabilitation programs for the severely handicapped. The 1973 law does not require federal or state agencies receiving federal funds to recruit affirmatively. However, state agencies and private institutions receiving federal funds cannot discriminate against the handicapped, under threat of losing financial support. State agencies and private institutions, while not obligated to recruit affirmatively, are required to hire the handicapped seeking employment.

The Employment Standards Division within the Department of Labor is charged with enforcing the 1973 act. The handicapped claiming discrimination must notify in writing the charged employer, who has 60 days to take corrective action. If dissatisfied with the employer's solution, the handicapped person notifies the Employment Standards Division within 180 days from the date the discrimination occurs. Conciliation is undertaken by the Employment Standards Division if the employer has in fact discriminated. While section 401 provides for the reevaluation of programs conducted to benefit the handicapped, section 503 (b) requires the receipt of a complaint before the Employment Standards Division can investigate and conciliate. The Employment Standards Division can refer the complaint to the contracting federal agency without investigating the charge.

The federal contracting agency can bring suit in a federal district court for breach of contract, specific performance, cancellation, etc. In addition, the offending contractor can be denied the right to future contracts. Neither the legislation nor the regulations authorize suit by the complainant and it is unlikely that the third party beneficiary theory, permitting suits for contract violations by nonsignatories, allows suit. The track record of the Department of Labor charged with enforcing the executive orders barring racial, religious, and sex discrimination has been unsatisfactory. There is no reason to believe that merely because Congress has outlawed health discrimination the Employment Standards Division will push more forcefully than the Office of Federal Contract Compliance. Furthermore, the House of Representatives has urged the Employment Standards Division to exercise caution when pressing enforcement of the act.[4]

The Taft-Hartley Act could be used to reach discrimination against the handicapped. While the federal legislation regulating employer-union relations and bargaining does not mention the handicapped, the requirement of fair representation, unfair labor practice charges,[5] and enforcement of agreements to arbitrate extends some protection. Section 7 of the Taft-Hartley guarantees the right to fair representation and the handicapped cannot be treated unfairly or subjected to irrelevant employment conditions.[6] Because of the Equal Pay Act, Vocational Rehabilitation Act of 1973, and state laws (later reviewed), a union would not fairly represent handicapped employees able to perform satisfactorily by denying them certain jobs or permitting a lower pay scale. Excluding handicapped workmen from benefits accruing because of seniority and limiting pensions is suspect unless economically justified. If physically handicapped workers capable of handling a job are discriminated against because of their union affiliation, an unfair labor practice charge could be brought against the employer.

Collective bargaining agreements usually contain a grievance and arbitration procedure, enforceable under section 301 of the Taft-Hartley Act, and handicapped workers could claim protection before an arbitrator under a "just cause" clause, seniority clause, or other provision. Arbitrators have made awards pertaining to the physical capabilities of workmen, overturning employer decisions.[7] However, for those seeking employment, the Taft-Hartley Act and arbitration do not offer much help. The handicapped employee cannot request arbitration—in the absence of capricious action or bad faith, only the union can demand that the employer arbitrate.[8] Like the remedy provided by the Vocational Rehabilitation Act, the handicapped cannot initiate arbitration.

State Legislation

Since 1971, states have enacted legislation to increase employment opportunities for the handicapped, often a simple amendment to the fair employment laws. Alaska, California, Connecticut, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, and Washington have enacted some type of legislation to assure fair employment. Some states, Nebraska, New Jersey, and New Mexico, exclude public employment from coverage; in these and other states without fair employment laws, the reasonableness and fairness of standards established by the state can be questioned under the Fourteenth Amendment.[9] The North Carolina legislation applies only to state and municipal agencies and not private employers. Iowa and Illinois, contrary to other states, do not mention employment agencies while condemning employer and union discrimination against the handicapped. In Alaska and Oregon, only discrimination by the private employer is expressly prohibited.

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[4] Hearings before subcommittee of the Committee on Appropriations, H.R., 93rd Cong., 2nd Sess., Part I, p. 381 (3-6-72).

[5] NLRB v. East Texas Steel Castings Co., 33 LRRM 2793 (CA 5, 1954); Caroline Mills, Inc., 92 NLRB 1141 (1951); NLRB v. Griggs Equipment Co., 51 LRRM 2020 (CA 5, 1962); Lipman Bros., Inc., 147 NLRB 1432 (1964); Federal-Mogul, 67 LRRM 2686 (CA 8, 1968); Atkins Pickle Co., 181 NLRB No. 144 (1970).

[6] Miranda Fuel Co., Inc., 140 NLRB 181 (1962), 54 LRRM 2715 (1963).

[7] Safety Elec. Equipment Corp. v. Elec. Workers Union, 62 LRRM 2786 (D.C. Conn., 1966); Int. Auto Sales v. Teamsters Union, 73 LRRM 2829 (D.C. La., 1970); Expert Dairy Service, 45 L.A. 217 (1965); New York Shipbuilding Corp., 31 L.A. 690 (1958); Republic Steel Corp., 25 L.A. 238 (1955).

[8] Vaca v. Sipes, 386 U.S. 171 (1967).

The state laws fall into three categories. Alaska, California, Connecticut, Kansas, Maine, Montana, Nevada, and New Jersey only forbid discrimination against those applicants or employees with a "physical disability." The definition of "physical disability" is important to determine entitlement to coverage. While these states broadly define "physical disability," no mention is made of mental incapacity and the mentally handicapped are, apparently, unprotected. Some states, Montana, New Jersey, and Rhode Island, while only barring discrimination against the physically disabled, specify "illness." The legal question raised is the type of "illness" protected by the state legislation. "Illness," is something other than "physical disability," and "illness" is a term sufficiently broad to include mental illness. However, court interpretation is necessary because "illness" may be related to "physical disability." In Alaska, California, Connecticut, Kansas, Maine, and Nevada, the definitions of "physically disabled" do not include "illness." Is epilepsy a "physical disability," and can some "illness" be considered a "physical disability"?

A second category of legislation includes the states barring "physical and mental" discrimination, like Illinois, Massachusetts, Nevada, New Mexico, and Oregon. In these states, all disabled persons, irrespective of the illness or disability, are protected. Employers can only protect themselves from a charge of discrimination by proving the applicant's inability to hold the job or establishing entitlement to a BFOQ. In the third legislative category, including Iowa, Minnesota, Nevada, New Mexico, and Oregon, discrimination against the "disabled" is forbidden. The definitions of "disability" include the mentally and physically disabled, so that the reach of the second and third legislative categories is similar. New York, unlike other states, requires that "mental disability" be established "by medically accepted clinical or laboratory diagnostic techniques. . . ." However, it is likely that all states will require the same medically acceptable procedures to establish mental conditions.

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[9] Reed v. Reed, 404 U.S. 71 (1971); Eisenstadt v. Baird, 405 U.S. 438 (1972); Morey v. Doud, 354 U.S. 457 (1957); Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167 (1961); U.S. v. Classic, 313 U.S. 325 (1941); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Staub v. City of Baxley, 355 U.S. 313 (1958).

The initial federal Vocational Rehabilitation Act was similar to the Massachusetts legislation which protects "any rehabilitated handicapped person who possess(es) the physical and mental capacity" to satisfactorily fill a given job. A key factor in the Massachusetts law is "rehabilitation," implying some certification that training, possibly state-sponsored, has been satisfactorily completed.

Paying the disabled reduced wages would violate the Equal Pay Act and the state health laws unless it can be demonstrated that he or she is less efficient than other workers.

OTHER FAIR EMPLOYMENT CATEGORIES

Chapter XV

HOMOSEXUALS

The Ancient Views

Another segment of society facing considerable employment hostility is homosexuals. Sexual deviation from "normal," at least until recently, was carefully hidden, and it is difficult to gauge accurately the extent of employment discrimination faced by homosexuals. Somewhere between four and five percent of our adult population over 18 years of age are hard core homosexuals with little or no interest in the opposite sex. In addition, an even larger percentage of the population is bisexual, so that a considerable number face public antagonism, being exclusively homosexual or bisexual (there is little reason to believe that society will treat differently exclusive homosexuals or bisexuals). While some states have passed laws repealing the criminal regulation of homosexual play between consenting adults, it is unlikely that society is ready to accord full membership. This poses a problem of some magnitude, considering that anywhere from 4 percent to 20 percent of our adult population are exclusively homosexual or bisexual. Because of a recent willingness to "come out of the closet," which will probably increase in the future, employment problems could multiply rapidly.

Homosexuals are no longer stoned to death, as provided for in the ancient rabbinical codes, or burned to death or castrated, as ordered by ecclesiastical courts holding exclusive jurisdiction, but public antagonism remains extensive. Public[1] and private[2] employers unquestionably view homosexuality as reprehensible, at best sickness or disease. Novelists, playwrights, newspapermen, broadcasters, and the educated have shown greater understanding and tolerance, but change is slow. The business community and unions, supported by religious dogma and widespread distaste for "deviants," may be less tolerant of homosexuals than others. If education and medical understanding continue to spread, increased tolerance can be anticipated. Younger voters tend to be more tolerant than older voters and are more likely to support bills promoting fair employment for homosexuals.

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[1] Schlegel v. U.S., 416 F. 2d 1372 (ct. cl.), *cert. denied,* 397 U.S. 1039 (1969); Morrison v. Bd. of Educ., 461 P. 2d 375 (Cal., 1969); Anonymous v. Macy, 398 F. 2d 317 (CA 5, 1968); *cert. denied sub. nom.*, Murray v. Macy, 393 U.S. 1041 (1969); Dew v. Halaby, 317 F. 2d 582 (D.C. Cir., 1963), 376 U.S. 904 (1964); Scott v. May, 349 F. 2d 182 (D.C. Cir., 1965); Vigil v. Post Office Dept., 406 F. 2d 921 (CA 10, 1969); McConnell v. Anderson, 451 F. 2d 193 (CA 8, 1971); Morrison v. State Bd. of Educ., 461 P. 2d 375 (Cal., 1969); Taylor v. U.S. Civil Service Com., 374 F. 2d 466 (CA 9, 1967); Adams v. Laird, 420 F. 2d 230 (D.C. Cir., 1969).

[2] G.A.A., *Employment Discrimination Against Homosexuals,* Supp. #1 (unpublished report of Feb. 3, 1971).

The Judaic-Christian religious influences in Western Europe and the United States have waned, and religious philosophers have been urging greater acceptance of homosexuality, often questioning church dogma. Nevertheless, meaningful change is slow, and ancient doctrines control. The past influence of religion on law was significant, and an examination of Judaic and Christian theology, as well as the ancient Greek and Roman societies, is necessary to show how past and current attitudes were molded, preventing current changes.

Judaism

Early Hebraic records do not disclose tolerance for homosexuals. While the Ten Commandments condemn adultery and lusting for the wife of another, homosexuality is not mentioned, perhaps a laissez faire signal. However, silence does not always signify tolerance. The first recorded signs of Judaic concern are not based on theological prohibitions but on norms of community behavior expressed by leaders. Jewish leaders prohibited copulation between male partners (females are not mentioned), wearing clothing of the opposite sex, and buggery. Somewhat later, sodomy was condemned. In Leviticus 20:3, the male was forbidden to "lie with mankind as with womankind, (as) both of them have committed an abomination: they shall surely be put to death." Homosexual play among religious personnel was banned even before the rule was extended to other Jews, Moses calling for the invocation of the death penalty for the practice of sodomy. As outlawed in the *Book of Kings*, temple personnel practicing sodomy were forbidden to emasculate themselves to preserve the softness and grace of the young. Deuteronomy 22:17 tells of the temple *kadesh*, perhaps a male prostitute who also served during religious ceremonies, fulfilling heterosexual or homosexual needs. There are references in Hittite, Chaldean, and Hebraic commentaries of male prostitutes. The *kadesh* served barren women, expected by the First Commandment to be fruitful.

It is possible that religious leaders condemning the wearing of female clothing were concerned with the religious ceremony. Maimonides refers to the wearing of women's clothing during worship and religious orgies and Syrian priests and worshippers sported women's clothing. Another explanation for the ban on clothing of the opposite sex was the prevention of men seeking to escape military obligation.

Buggery, copulation between man and beast, was outlawed in Leviticus 18:24. The Jewish revulsion for buggery, later transferred to homosexuality, also appears in Leviticus 20:15, 16, stating, "And if a man lie with a beast, he shall surely be put to death; and ye shall slay the beast. And if a woman approach any beast and lie down thereto, thou shalt kill the woman and the beast; they shall surely be put to death; their blood shall be upon them." Further illustrating the Jewish concern with buggery was the prohibition placed upon widows who were not allowed to keep dogs. While separate codes of behavior for Jew and non-Jew prevailed, buggery was an exception; only the penalty differed—Jews were stoned to death, a more painful ending, while non-Jews were beheaded.

The homosexual prohibition originally pertained to males practicing sodomy. Women homosexuals were unmentioned, possibly due to the penetration of the male body by sodomists, an affront to God. Another explanation is the Hebraic condemnation of Egyptians in *The Contendings of Horus and Seth* (XI:3-4). Horus, the posthumous son of the God Osiris, commits an act of sodomy upon his Uncle Seth, symbolic of the defeat of an enemy.

Genesis 9:21-27 prohibits communal bathing in the public bathhouse by father, father-in-law, and brother-in-law; later, common bathing was permitted if the genitalia was covered. Was there homosexual concern within families? Strangely, the same taboo was not imposed on strangers and friends in the bathhouse.

The passage most frequently cited in the Old Testament as support for the condemnation of homosexuality is Genesis 19:1-29, the Sodom and Gomorrah episode in which God destroys the twin cities because of the sin of its residents. Genesis reads:

> But before they lay down . . . the men of Sodom, both young and old, all the people to the last man, surrounded the house; and they called to Lot, "Where are the men who came to you tonight? Bring them to us, that we may know them." Lot went out of the door to the men, shut the door after him, and said, "I beg you, my brothers, do not act so wickedly. Behold, I have two daughters who have not known man, let me bring them out to you, and do to them as you please; only do nothing to these men, for they have come under the shelter of my roof. . . ."

Not until the second century B.C., in the *Book of Jubilees*, was Sodom and Gomorrah interpreted as God's disapproval of homosexuality. To reach this conclusion, emphasis was placed upon the townspeople shouting, "Bring them to us, that we may know them." The Hebrew *yadha* is translated as carnal play or an intimate friend. *Yadha* in Sodom and Gomorrah was interpreted by the Hebrews to describe homosexual play, thereby condemning the influential Greeks practicing pederasty. The Hebrew term for sex between consenting parties is *shakbabb*, but since *yadha* appears in the text some scholars claim that homosexual play with force is described.

The time elapsing between the recording of Sodom and Gomorrah and its homosexual interpretation suggests a deliberate misinterpretation. In addition, the statistical probability that all townspeople were gay or that sexual gratification was sought at the same hour is slight. For the "young and old" to be out during darkness and at the same hour suggests a threat to safety or an equally catastrophic event. Since Lot was entertaining strangers and was himself a newcomer, the townspeople may have feared for their safety. A father would not offer his daughters to men, but the interpretation is even more unlikely if the offer were made to men interested in homosexual play, in effect wasted effort by Lot.

That the townspeople were "living it up" the night that Lot is threatened is unlikely; it is more plausible to assume that the citizens of Sodom and Gomorrah feared for their safety and a Trojan horse type incident. The deliberate misinterpretation of Sodom and Gomorrah could constitute Hebraic strategy to undermine Greek influence. While Jews wandered or lived on a farm, Greek city-state influences were likely to be negligible. As Jews migrated to cities, appreciating learning and culture, Greek influence could have threatened the Hebraic way of life. The First Commandment obligates the Hebrew to be fruitful and multiply, essential for survival in a hostile environment. While the Greek bisexual assured continuity of race and limited population, a desirable feature in the ideal city-state, Hebrew compliance with the First Commandment called for growth.

Sodomy, outlawed in Leviticus but not Genesis, is also referred to in the *Pentateuch*—"(t)here shall be no whore of the daughters of Israel, nor a sodomite of the sons of Israel." The *Pentateuch* does not condemn all homosexual practices, only sodomy. Nevertheless, all forms of homosexual expression were religiously condemned with the passage of time.

Christianity

The New Testament references to homosexuality are:

1. Romans 1:26, 27. "God gave them up into vile affections; for even their women did change the natural use into that which is against nature: And likewise also the Men, leaving the natural use of the women burned into their lust one toward another; men with men. . . ."
2. Corinthians 6:9. "Know ye not that the uprighteous shall inherit the Kingdom of God? Be not deceived: neither fornicators, nor idolators, nor adulterers, nor effeminate, nor abusers of themselves with mankind."
3. Timothy 1:90. "Knowing this, that the law is not made for a righteous man but for them that defile themselves with mankind."

Romans and Corinthians clearly express Christian hostility to homosexuality while Timothy is less clear.

Jesus Christ did not express an opinion, although Paul expresses distaste for homosexuality in Romans 1. Paul condemned those serving "the creature more than the creator." Tertullian referred to homosexuals as sinners while Basil demanded the same punishment of homosexuals as murderers, idolators, and practitioners of witchcraft. St. Thomas Aquinas later condemns homosexual behavior, accepting the Hebraic interpretation of Sodom and Gomorrah, adding the Catholic view that sex for pleasure and not procreation was sinful. Homosexual play cannot lead to conception, indirect Christian support for the First Commandment. Augustine reasoned that sodomy was sinful, an abuse of God's body. The Penitentials, labeling all homosexual behavior sinful, prescribe varying penance, depending upon the homosexual practice. The degree of penance was geared to active versus passive role, first or subsequent act, sodomy, etc.

During the Dark Ages, sodomy was equated with religious heresy and witchcraft; it was later considered a treasonable offense. Ecclesiastical jurists punished practicing sodomists by ordering their death, and innocent spouses could get an annulment.

The Greeks

It is sometimes claimed that pederasty originated in Crete, where the local deities cavorted. All of the male Greek Gods carried some special affection for another male. The affair between Zeus and Ganymede is taken as evidence of the acceptability of pederasty. Hermes, the God of Boys, was displayed in every gymnasium. Dionysus was a soft and round God. Orpheus, immortalized for his love of Eurydice, was versatile enough to like handsome young men.

Greek adults formed an alliance with sexually mature boys, providing mental and physical stimulus, an ideal relationship. The Greek citizen was expected to be bisexual; the *kinaido*, the exclusive homosexual, soft and effeminate, was ostracized. Museums contain works of art showing the preoccupation of Grecian artists with the athletic bodies of young men; women were not artistically eulogized.

To educate the young, close personal relationships were encouraged; arrangements were entered into between the adult and parents of the young man. Military experts in Thebes and Sparta theorized that soldiers forming a close friendship were more likely to help each other during battle. Plato reasoned that men attached to each other guaranteed a superior military force. The Spartan Lycurgus frowned upon homosexual play while encouraging intimate friendship in the military; homosexuality was probably common in the military when men in the fields were without female companionship for long periods of time. Homer, in the *Iliad*, frequently refers to male friendships, indicative of homosexual attachments. Poets, like Pindar, Aeschylus, and Sophocles, openly praise pederasty. Hercules, a masculine symbol, was interested in young boys. Socrates and Solon, the Athenian law-maker, favored the bisexual life-style.

The Romans

The Romans initially followed the Greek way of life, accepting homosexuality. But influential Romans, witnessing the demise of the Greek civilization, eventually criticized the effeminate homosexual, incapable of protecting and promoting the Roman Empire. The Romans relied upon military force and legal positivism to control their vast empire, and threats to survival had to be contained and removed. Homosexuals, given these circumstances, were considered unreliable, and Roman men of letters were not complimentary to them. The *Satyricon* begins with an older man seducing a younger man; Petronius was certainly critical of homosexuals.

Lex Scantania, an early Roman code, prohibited pederasty between slave and aristocrat, a rule often ignored. Nero married the slave Sporus after ordering his castration. Hadrian was fond of Antinous. But *Lex Scantania* indicates that the Romans did not frown upon homosexual play among freemen. Julius Caesar was bisexual. It was not until the reign of Justinian the law-giver that sodomy was made illegal even among freemen. Justinian, was influenced by the Christian emperors Constantius and Theodosius, who demanded the death of those guilty of sodomy. Justinian lived from 483 to 565 A.D., influenced by the decadence of the well-born Roman and the condemnation of homosexuality by Christianity. Justinian, plagued by famine, earthquake, and pestilence, felt, *a la Sodom and Gomorrah,* that God punished those tolerating homosexuality. There is little evidence that Justinian was able to stamp out homosexuality. Because the sexual act is private, the decree banning sodomy would be difficult to enforce.

The English Law

English sodomists during the Middle Ages, 500 A.D. to 1450 A.D., were tried before an ecclesiastical court, having violated God's word. The secular courts were without jurisdiction unless the homosexual was referred for trial by an ecclesiastical court. The *religioso,* evidently, punished few homosexuals. Because of homosexuality within its ranks, clergymen may have been reluctant to condemn public wrongdoing. For example, the Knights Templar during the fourteenth century was a sanctuary for the homosexual; homosexual performance was part of the initiation rite and a bisexual deity, Baphomet, was worshipped. Other religious cults adopting homosexual rites were the Theocratic Unity, Thelemites, Evadists and Golden Dawn.

Sodomy was placed under exclusive secular jurisdiction in 1533, during the reign of Henry VIII. Scholars claim that sodomy was made a secular crime because ecclesiastics were reluctant to punish offenders. The law of 1533 was canceled and later revived in 1562. Until 1861, the penalty was death, when a change to life imprisonment was made. In 1885, the penalty for sodomy was further reduced to two years in prison.

Lord Coke refers to the 1533 statute, agreeing that sodomy should be punished, as a "detestable and abominable vice," citing Leviticus as authority for his position. Coke also refers to the crime of buggery. Blackstone in *Commentaries* refers to buggery and sodomy as "the infamous crime against nature, committed either with man or beast . . . so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out." Blackstone also states:

> And our ancient (English) law in some degree initiated this punishment, by commanding such miscreants to be burnt to death: though Fleta says they should be burned alive; either of which punishments was indifferently used for this crime among the ancient Goths. But now the general punishment of all felonies is the same, namely, by hanging: and this offense (being in the times of the popery only subject to ecclesiastical censures) was made felony without benefit of clergy (by Henry VIII). . . .

During the twentieth century, all forms of homosexual play, lumped together as "indecent acts," became a misdemeanor in England. Parliament in 1967 enacted the Sexual Offences Act, legalizing homosexual play in private between consenting adults (except in the military and merchant marine).

France burned the homosexual at the stake until the eighteenth century. A wave of liberalism in France brought about philosophical changes in the law, that only people injuring society should be criminally punished, leaving heterosexual and homosexual play to the conscience of the individual and his church. In the 1810 *Code Napoleon*, sodomy and other forms of homosexual expression were not criminally punished if conducted privately.

The United States

All states at one time criminally outlawed homosexual play. Recently, a few states like Illinois, Connecticut, and Oregon, legalized homosexual play in private between consenting adults. While homosexual crime is infrequently brought to the courtroom, many are repelled by the thought and its practitioners. Consequently, homosexuals may be in need of employment protection, facing discrimination in the public and private sectors. If considered as a health disability, an endocrine imbalance established by a sperm count, state fair employment health laws may protect the homosexual. It is doubtful, given the current social climate and state of medical knowledge, that homosexuality would be accepted as a physical disability. If considered a mental illness, it is still questionable as to whether homosexuals could successfully claim protection under the state health laws. As yet, cases have not been brought to court under the health laws.

Attempts were made in New York as early as 1971 to protect homosexuals under municipal and state fair employment legislation. While these legislative attempts proved unsuccessful, some protection has been accorded the homosexual seeking or holding public employment in the courts. The Supreme Court has not considered the employment rights of homosexuals to public jobs, federal or state, under the Fifth and Fourteenth Amendments. However, a number of decisions have been made by the lower courts which to some extent guarantee procedural due process. There is little question that state and federal regulatory agencies can prescribe reasonable rules to assure the efficiency, physical fitness, moral character, etc., of public jobholders. Consequently, questions arise as to whether homosexuals are physically and mentally fit, efficient, moral, etc., when denied employment.

There is no reason to believe that homosexuals are less efficient than heterosexuals. In fact, some studies show that homosexuals generally are better educated than heterosexuals, one sign of efficiency. And it is doubtful whether homosexuals, known or suspected, hamper the productivity of other employees. Some doctors cling to the view that homosexuals are mentally unbalanced—most doctors are contra—but nevertheless are capable of holding jobs. Therefore, it seems that homosexuals are considered to be immoral, particularly when criminally convicted. In addition, there is no question that public officials fear public criticism and are unwilling to provide employment for this reason.

A few members of the judiciary cling to the traditional position that public employment is a privilege, entitlement to be determined by the public agency without court interference. Based upon the shopworn thesis of separation of power of the executive, legislative, and judicial branches of government, judges have been reluctant to question hiring standards in the public sector. Slowly but steadily the courts have shown an increased willingness to hear questions revolving about denials of procedural due process of law. From the vantage point of homosexuals, the public more willingly defends the right to procedural safeguards to assure fair play than substantive guarantees to employment.

In *Dew v. Halaby*,[3] the plaintiff was dismissed from the Federal Aviation Agency after 20 months of satisfactory service because of homosexual conduct occurring when he was 18 years of age. The plaintiff was 26 years of age when suing, married, and the father of a child. In addition, medical evidence supported the plaintiff's claim that he was a well-adjusted family man who would not revert to past sexual practices. While awaiting decision by the Supreme Court, the government backed down and reemployed the plaintiff in spite of the lower court decision that there was no denial of due process. Does the reluctance of the lower court to question the discharge reflect the more traditional view of the judicial role in the executive branch of government? Dismissal of the plaintiff could be classified as a denial of procedural due process because there was no evidence that he was a practicing homosexual. In addition, the plaintiff had not been convicted of wrongdoing. Would the Supreme Court today hold that a "cured" homosexual is substantively entitled to employment?

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[3] 317 F. 2d 582 (D.C. Cir., 1963), *cert. dismissed,* 379 U.S. 951 (1964).

The same appellate court considered *Norton v. Macy*[4] six years later. The plaintiff, offering a ride to a hitchhiker, invited him to his apartment for a drink. A homosexual advance was charged by the hitchhiker, resulting in the plaintiff's discharge from his federal job. The plaintiff denied the accusation while admitting to homosexual tendencies in the past when drinking too much. Contrary to the *Dew* decision, the court in *Norton* ruled that a government decision could be reviewed to determine whether the discharge was for sufficient cause and whether the discharge was substantiated by evidence. Like *Dew*, the plaintiff in *Norton* admitted to past homosexuality which, evidently, is not sufficient ground for discharge if current homosexuality is not proven. Was the court protecting the substantive employment rights of the plaintiff since past homosexuality was not denied? It seems that the absence of proof of current wrongdoing, a denial of procedural due process, is not a satisfactory solution when past homosexuality is admitted.

Scott v. May[5] was considered on two separate occasions by the same court. In the first case, the court considered whether the plaintiff was properly disqualified from a federal job because an allegation had been made that he was a homosexual; specific evidence to establish homosexual activity was not presented. According to the majority opinion in *Scott*, federal employment cannot be denied or taken away unless evidence is presented showing the occurrence of specific homosexual acts. In addition, one judge took the position that denial of employment was improper unless homosexuality impairs efficiency, an unlikely event, a position that comes close to protecting the substantive right to employment. A concurring judge, however, felt that efficient homosexuals could be discharged under different circumstances. Justice Berger, prior to his elevation to the Supreme Court, wrote a dissenting opinion, containing the traditional view that the judiciary should not meddle in executive department affairs, the federal civil service should not be turned into a haven for deviates, and blackmail of the homosexual is possible.

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[4] 417 F. 2d 1161 (D.C. Cir., 1969). Also see *Society for Individual Rights v. Hampton*, 11 FEP Cases 1243 (U.S.D.C., N.D. Calif., 1973) and *Singer v. Civil Service Com.*, 12 FEP Cases 208 (CA 9, 1976).

[5] 349 F. 2d 182 (D.C. Cir., 1965); 402 F. 2d 644 (D.C. Cir., 1968).

After being rehired, the plaintiff in *Scott* was discharged for refusing to answer a question asking whether he was a homosexual. The agency contended that the plaintiff was discharged for refusing to answer a legitimate question and not for homosexuality. The court, without taking a position on the propriety of the question, held that the discharge was a pretext, intended to deny employment for unproven homosexual acts.

Homosexuals, typically, deny they are "gay" when asked. In the usual situation, unlike *Scott*, it appears that employers could rightfully refuse continued employment if homosexuality is deliberately hidden.[6]

In another case, a post office worker was convicted for a homosexual act and the court upheld his discharge.[7] The court noted the decision in *Scott*, where unverified charges constituted the basis for the discharge, while in this case the guilt of the plaintiff had been established in a court of law. In a similar situation, the plaintiff was discharged from his civilian job with the Air Force when two convictions for vagrancy and lewd conduct were uncovered.[8] The plaintiff claimed that his guilt had been wiped away under the California expunge statute. The appellate court took the position that expunging the prior conviction did not establish innocence. Thus, the discharge was based on inefficiency, the lack of moral character. In *McConnell v. Anderson*,[9] a male librarian at the University of Minnesota was refused employment when he applied for a license to marry a male friend. The lower court supported the plaintiff seeking the return of his job, taking the position that admitting to being a homosexual without proof of sexual acts does not constitute "immoral conduct" or inefficiency. The lower court also felt that there was a right to privacy providing efficiency is not impaired. The appellate court reversed, noting:

> . . . this is not a case involving mere homosexual propensities. . . . Neither is this a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is instead . . . a case in which the prospective employee demands . . . the right to pursue an active role in implementing his unconventional ideas. . . . We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands. . . .

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[6] Acanfora v. Bd. of Education of Montgomery County, 9 FEP Cases 1287 (CA4, 1974). In this case, the plaintiff was transferred from a teaching post to an administrative post and was not discharged.

[7] Vigil v. Post Office, 406 F. 2d 921 (CA 10, 1969).

[8] Taylor v. U.S. Civil Service Commission, 374 F. 2d 466 (CA 9, 1967).

[9] 2 FEP Cases 956, 986 (D.C. Minn., 1970); 3 FEP Cases 1106 (CA 8, 1971), *cert. denied*, 3 FEP Cases 1106 (1972).

The plaintiff in another case was certified to teach in the California high schools where he was employed for many years without any problems.[10] The plaintiff and a colleague engaged in homosexual play on four occasions, and six years passed without another homosexual incident. As a consequence of the homosexual play, the plaintiff was discharged without a hearing, which was ruled a denial of due process. The court here also emphasized the right to privacy that does not impair efficiency on the job.

Based on decisions reviewed, it seems that homosexuals in public employment are constitutionally protected to the following extent:

1. Accusations of homosexuality not supported by evidence or conviction do not justify exclusion from employment. Some courts, evidently, also extend protection to the admitted homosexual.
2. Past acts of homosexuality may not justify discharge if sexual life has been "normalized."
3. Decisions made by public agencies, state or federal, are subject to court review to assure procedural due process of law.
4. Some courts protect the right of public employees to privacy if performance on the job is not impaired or public goodwill jeopardized.

Where the national security is threatened, the conclusions drawn from the decisions cited are apparently not applicable. There are jobs in government that require security clearance, classified as "top secret." The position has always been taken that homosexuals are susceptible to blackmail and should be denied "top secret" jobs. Why homosexuals are more likely to be blackmailed than heterosexuals engaging in "unnatural" acts of sex or "cheating" on wives has never been demonstrated. A man about town interested in the opposite sex is not often considered a security risk even though he may be as prone to blackmail as homosexuals. Thus, the denial of employment may reflect a revulsion for the sexual inclination of the homosexual rather than a concern with national security.

The Secretary of Defense is authorized by executive order to prescribe regulations pertaining to private employment to protect the "national interest." Consequently, employees of private employers holding government contracts have been denied security clearance after a hearing before a public servant, leading to a loss of job. The rationale advanced for denying clearance is the protection of national security, homosexuals being susceptible to blackmail. Curiously, not only is the homosexual denied employment in "top secret" jobs, but the same employers will not place him in jobs that do not require security clearance.

In *Schlegel v. U.S.*,[11] the plaintiff, a civilian, was employed by the Army in a job that did not require security clearance. Because he was asked occasionally to handle top secret messages, an investigation was made and security clearance was denied because of the plaintiff's homosexuality. Even though the plaintiff was a veteran and the federal guidelines require a showing of inefficiency or discredit to the military–misconduct alone is deemed to be insufficient reason to take away the federal job of a veteran–the plaintiff was relieved of his job without evidence that the regulations were violated. The court in *Schlegel* was unwilling to determine whether homosexuality impairs efficiency, a position that is not likely to be proven by evidence, and instead emphasized the need for national security and the fear of public criticism.

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[10] Morrison v. State Board of Education, 461 P. 2d 375 (1969).

[11] 416 F. 2d 1372 (ct. cl., 1969).

In *Adams v. Laird*,[12] the plaintiff, working as an electronics technician for a private employer for seven years, lost his job when he was denied "top security" clearance. The plaintiff did not deny his homosexuality and argued that "top security" clearance could not be denied in the absence of proof of a clear and present danger to the government. Having held a job for seven years requiring security clearance, it is unlikely that the plaintiff would threaten national safety in a job classified as "top secret." It seems that the plaintiff lost, without justification, his lower level clearance even if the "top secret" clearance was properly denied.

A similar issue was faced in *McKeand v. Laird*.[13] An electronics engineer, an admitted homosexual, was granted security clearance in 1960, and his employer asked that his clearance be raised to "top secret" in 1967, which was denied. The court here felt that the finding by the hearing examiner that the plaintiff could be blackmailed supported the denial to grant "top security" approval. Under these circumstances, judicial review is limited to whether the evidence supported the conclusion. Here, there was reasonable belief, according to the examiner, that the plaintiff, the individual, posed a threat to national safety so that it "is unnecessary . . . to decide whether a finding of homosexuality alone would be sufficient to uphold the denial of a security clearance." The dissenting judge felt that the evidence did not support the conclusion that the plaintiff was a security risk[14] and "(t)he Department of Defense easily can cure the danger to national security. . . . It can abandon its arbitrary system of revoking security clearances solely on a finding of homosexuality and, thus end . . . fears that public exposé will cost them their security classifications." The court also noted that the plaintiff was employed for seven years without presenting any problem. The dissenting judge felt that the Fifth Amendment protected the right to employment. However, if the private employer had made a decision, without government involvement, to refuse a promotion or discharge, the Fifth Amendment could not be considered. For this and other reasons, some urge that the fair employment laws be amended to protect homosexuals.

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[12] 420 F. 2d 230 (D.C. Cir., 1969).
[13] 490 F. 2d 1262 (CA 9, 1973).
[14] Also see *Wentworth v. Laird*, 348 F. Supp. 1153 (D.D.C., 1972).

Chapter XVI

ARRESTS AND CONVICTIONS

Introduction

A strong pull is evident as opposing forces of reason collect data to influence changes in the rights of those charged or convicted of crimes. One viewpoint, increasingly supported in recent years, is that jails are not intended to rehabilitate—in fact being put behind bars cannot lead to rehabilitation—but to protect society from the excesses of wrongdoers. Proponents of this viewpoint feel that crime has increased because society has gone "soft," forgetting the true purpose of putting people behind bars, seeking a return to stiffer (and mandatory) sentences to reverse the tide. Proponents of this view often feel that those arrested or convicted are not entitled to help when they seek employment, claiming that rehabilitation is unlikely. Nevertheless, those advocating stiffer penalties may retard the push by "soft" line opponents who feel that those criminally entangled must be helped to prevent recidivism. While those concerned with fair employment do not necessarily side with the "humanization" of criminal justice, it seems apparent, as later developed, that judges favor the views of sociologists that environment and not genes determines behavior. Thus, help is essential to change the antisocial behavior of wrongdoers.

It seems that society in the future will probably do more, not less, to protect the employment rights of ex-offenders. It is also probably true that society too frequently ignores the negative impact upon offenders when employment opportunities and training are denied, increasing the probability of recidivism. The measuring rod of success in society is income and prestige of job—usually the two are related—and rehabilitation cannot be accomplished if ex-offenders are not given an opportunity to succeed economically. While this approach may not result in striking changes, it seems likely that recidivism would occur less frequently if followed. To bring about these changes, society will have to change correctional practices and open doors to jobs in the private and public sectors. Legislative changes are, evidently, occurring less rapidly than are judicial changes in constitutional and interpretive philosophy.

Based upon past legislation, judicial interpretation, and employer-union attitudes, there was a widely shared belief that ex-offenders are unreliable, untrustworthy, and low-intelligence types incapable of learning. Consequently, public agencies and corporations properly denied employment to

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criminal offenders. Ex-convicts hiding their past were quickly discharged, even those with an excellent performance record, when employers discovered the "big lie." That coverup was natural given society's predisposition to judge all convicts as unworthy was not taken into account when discharge from employment was ordered. Many employers conceded that some ex-offenders are worthy of rehabilitation, but separating the meritorious from the unworthy was too difficult, not worth the effort. In fact, little consideration was given to applicants seeking jobs who were arrested but not convicted. The burden fell upon the poor in particular, being more likely to be arrested and convicted than the middle class and rich. White collar crime is the province of the upper income families while violent crime is more common among the poor, and society was more willing to tolerate white collar crime. The poorest in our society have been blacks, Mexican-Americans, Puerto Ricans, Indians, etc., so that many ex-convicts felt that they were being punished for racial reasons and not because of criminal skirmishes. For those released from a county, state, or federal prison, the inability to find employment with a future smacked of double jeopardy—not only had they been imprisoned for their crimes, but economic punishment was heaped upon them after release from prison.

There is another dimension that ex-offenders fail to take into account which creates a barrier to meaningful employment. Coming from poor families, most offenders are undereducated and without industrial expertise. If unemployed or holding a menial job before conviction, they are released from prison with little or no attempt made to provide in-house education and training. Given these circumstances, incarceration in a prison is not a rehabilitative experience, the prison sentence protecting society only while offenders are imprisoned. The inability to find a prestigious job (herein defined as one highly skilled or with future promise) upon release often meant a return to a life of crime. Ex-convicts, aware of the toleration of white collar crime, felt justified in returning to a life of violent and other crime.

While probably necessary to protect society, imprisonment seldom encourages "the good life" and recidivism is frequent. If prison increases recidivism, society, if possible, is obliged to seek reform. Imprisonment leading to subsequent delinquency, without the public providing meaningful guidance and preparation, is short-sighted. Prison officials, it can be reasoned, are duty bound to limit the negative aspects of incarceration to prevent future crime.

Those with long-term sentences or second offenders would experience considerable difficulty finding jobs even without a criminal record. Largely unskilled and, say, over 40 years of age, when the number and severity of physical ailments multiply, increase the probability that employers would not hire them. Ex-convicts released from prison are today in a better position, legally speaking, to claim jobs previously denied them for reasons of age and health. While age and health discrimination was permitted legally, the ex-convict was taking his lumps like others. Today, older ex-convicts are at a disadvantage no longer faced by other citizens, to some degree a sign of inequality. But convicts released from prison need a salable skill and education before equality of opportunity can be considered. Most people acquire a skill before 40 years of age, pursuing a lifetime career.

Work programs have been recommended as a tool to aid reform. However, many convicts work in prison to prevent boredom, fighting, cleaning "alma mater"; few learn a skill that can be utilized later. In some instances, labor at dull and repetitive jobs is required, earning money for the prison. Products are produced based upon a contract made between prison officials and corporations interested in cheap labor. Yet, the same corporation may be unwilling to hire ex-convicts, to some another sign of exploitation. Some prisons provide unskilled labor for state projects. Unfortunately, too few jobs in prison provide apprentice training. If imprisonment is supposed to encourage rehabilitation, meaningful training programs, in or outside the jail walls, must be increased substantially. Those operating jails, aware of the needs of inmates, claim that programs cannot be enlarged or initiated because of a lack of facilities and funding, and public officials and private employers are unwilling to cooperate.

Most of the penal institutions criticized for failing to provide employment house male offenders. If the corrective and training programs are inadequate for male inmates, those provided for women are even less satisfactory. Like male convicts, women accused of a crime or imprisoned lack education and industrial skill, often unemployed when tangling with law enforcement officers. Women are less frequently accused of crimes or imprisoned than men and tend to be more docile in prison, so that less public concern is generated to provide meaningful education and training. The type of training provided in prison is of the housekeeping or, at best, clerical or needle variety—for example, mechanical training is unheard of. While sex discrimination in employment was legal, prison officials could claim that providing clerical training, typing, shorthand, and low-level bookkeeping, and needle trade experience was the ideal approach since women would not be hired in other jobs. The traditional skilled jobs, such as nursing and public school teaching, would be unavailable to ex-convicts, a realistic assessment. But changes are taking place slowly without prison officials initiating more imaginative training programs. Women released from prison are too often unable to support themselves, at best latching onto jobs with little future. Given these circumstances, the penal system encourages recedivism.

That women should be given an opportunity to acquire industrial skills, at least to the same extent as male prisoners, is nothing more than fair play, a call for equal opportunity. While imprisoning women may be statistically, sociologically, and psychologically different than imprisoning men, there is considerable similarity, requiring even-handed treatment and training. For example, the average sentence for women is less than the average sentence for men, and women, less likely to act up in prison than men, serve less time, are paroled earlier. If the sentence is short, meaningful industrial training for men and women is difficult to provide. But there are women scrubbing floors and bathrooms who will spend enough time behind bars to learn a skilled trade. While women are less likely than men to commit a crime, the tempo has been increasing. Consequently, it is essential to increase training programs for women.

In terms of fair play for ex-offenders, male or female, fair employment opportunities should be provided for those released from prison. Social-minded employers concede this. But if job-seekers are not qualified, employers will not consider them however social-minded.

Public commitment to fair employment points strongly to the need to evaluate the individual and not the group, that group assessments used to measure the individual are often erroneous or unnecessarily damaging. Similarly, qualified ex-convicts should also be evaluated on an individual basis. The ex-convict (and those arrested but not convicted) should be evaluated individually together with the job sought, weighing such factors as number of arrests and convictions; crimes accused and/or convicted of; age when arrested, convicted, and released from prison; years elapsed since last arrest or conviction; types of jobs held in the past; social and industrial evaluations; etc. An assessment will now be made of the employment rights of those tangling with the law under existing legislation and constitutional interpretation.

Arrest Records

It was probably inevitable that black males tangling with the law would turn to Title VII to force change. Blacks denied employment because of arrest records could challenge the impact of damaging employer policies considered to be neutral and nondiscriminatory if Title VII were broadly interpreted. By pointing to court decisions announcing, even before *Duke Power Co.*, that neutral policies could be reached under Title VII without proving intentional discrimination, black men could establish that they were more likely to be arrested than white men.[1] In addition, black women were more likely to be arrested and convicted than white women. While such protection would not help Orientals less likely to be arrested or convicted than white Americans, nevertheless the opening wedge was provided. Per *Duke Power Co.*, the criterion adopted by employers for selection had to be related to the job unless "business necessity" could be established.

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[1] Asbestos Workers Union v. Vogler, 407 F.2d 1047 (CA 5, 1969); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (CA 10, 1971); Papermakers Union, Local 189 v. U.S., 416 F.2d 980 (CA 5, 1969); *cert. denied*, 397 U.S. 919 (1970).

In *Gregory v. Litton Systems, Inc.*,[2] a black arrested upon fourteen occasions but never convicted claimed discrimination under Title VII when employment was denied by the defendant. Because all applicants for jobs with arrest records, white or black, were denied employment, intentional discrimination could not be established. The employer, however, violated Title VII because the percentage of blacks denied employment would be greater than whites seeking jobs. In 1969, 27 percent of all those arrested in the United States were black while composing 11 percent of the total population. The percentage of black arrests is even greater if the geographic distribution is confined to large cities where blacks concentrate.

The district court carefully noted that

> There is no evidence (to support) a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected . . . to perform less efficiently or less honestly than other employees. In fact, the evidence in this case was overwhelmingly to the contrary. Thus, information concerning a prospective employee's record of arrest without conviction is irrelevant to his suitability for employment. . . .

For good measure, the court added that "(t)here is not business justification for the continued use of the . . . policy. . . ." Matters of "arrest which do not result in formal prosecution are not matters of public record," and the law prohibits the release of such information.

Employers seek information pertaining to arrests and convictions as though related to efficiency, morality, honesty, etc., refusing employment as in *Litton*. The penalty is discharge for those who lie about their past record. The same employers often fudge on records and reports when necessary to procure favors, resort to bribery to secure contracts, fail to comply with public regulations, etc. The net effect is to expect more of employees than employers following these employment policies.[3] Employees hiding brushes with the law should be excused, society accepting what is commonly referred to as the "white lie." If jobs are needed and ambition is fanned by social attitudes, covering is to be expected. Few jobs in a firm necessitate hiring those with a spotless record; in fact, those who have not tangled with the law may have acted dishonestly or immorally in the past.

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[2] 316 F. Supp. 401 (C.D. Cal., 1970), *affirmed*, 472 F.2d 631 (CA 9, 1972).

[3] Branch Motor Express Co., 52 L.A. 451 (1969); Int'l Paper Co., 52 L.A. 1266 (1969); Yellow Cab Co., 55 L.A. 590 (1970); Basic Magnesia Co., 57 L.A. 53 (1971); Bethlehem Steel Corp., 57 L.A. 883 (1971); Kentile Floors, Inc., 57 L.A. 919 (1971); Kroger Co., 57 L.A. 1053 (1971); Blue Chips Stamps Warehouse, 58 L.A. 148 (1972); So. Calif. Edison Co., 59 L.A. 529 (1972).

The plaintiff in *Litton* admitted his past. An important factor not considered by the court was that 13 of the arrests were made before 1959 and the plaintiff sought employment at Litton in 1968. It doesn't seem likely that the plaintiff would pose a problem after one arrest in the preceding nine years. Also, the plaintiff applied for a job as a sheet metal worker, a job that does not threaten national security even though the firm held government contracts. Some jobs could be industrially sensitive to warrant a denial of employment, but sheet metal work is not one of them. While innocence is presumed until guilt is established, a cardinal principle of criminal law, arrests may indicate a lack of maturity, reliability, etc., so that some jobs are sufficiently sensitive to warrant consideration of recent, and perhaps distant, skirmishes with the law. The district court nevertheless issued an injunction prohibiting the employer from seeking from applicants information concerning arrests that do not lead to conviction. In fact, "public record information concerning arrests alone may not be utilized . . . as a factor in determining employment." It seems that situations may arise, especially where a class action is brought, where such information is relevant. Other courts could disagree with such a broad prohibition.

While *Litton* was considered by the appellate court,[4] the acceptance of the district court decision was assured because of the Supreme Court decision in *Duke Power Co.* The Supreme Court followed without deviation the course taken by the district court in *Litton.* If the effect of a policy (not hiring those with arrest records) or test has a more devastating impact on the black than the white community, Title VII is violated in the absence of "business necessity." If, as claimed by the district court in *Litton,* there is evidence that the criminally entangled make good employees, employers holding the burden of proof will have difficulty establishing "business necessity."

One disturbing aspect of the *Litton* decision is the protection extended to black arrestees under Title VII that may not be extended to white arrestees. Since the impact of the employer's policy could not be racially restrictive, whites bringing suit would not succeed unless reverse discrimination were established. If arrest records and convictions unfairly measure job applicants, it would be true irrespective of race or religion. To interpret Title VII so as to protect blacks bringing suits while whites are unprotected smacks of unequal protection of the law. While the position is not taken that there is a Fifth Amendment violation because of the current interpretation of Title VII, inequity is apparent. Suppose the bulk of the employees of a firm are of Japanese or Chinese descent. Could whites denied employment because of criminal entanglement establish a violation of Title VII since Oriental people are less likely to be arrested and convicted? Absurd situations could arise by relying on the effect doctrine in the criminal field.

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[4] The *Litton* decision was modified for reasons not pertinent to the above discussion.

Convictions

Employers unwilling to hire those arrested are less willing to hire ex-convicts. There are some strange overtones when large employers defend policies denying employment to those convicted of a misdemeanor or felony.[5] Employees accused or convicted of criminally violating the antitrust or federal election laws are reluctantly punished by employers. Consent decrees are resorted to, which do not count as a conviction or arrest of employers. The different treatment accorded employees guilty of white collar crime, especially when committed in behalf of the firm, as opposed to violent crime, is apparent. The most obvious explanation for the double standard is profit—crime is more likely to be forgiven if done "in the line of duty" to enhance the employer's profit. The typical ex-convict, on the other hand, commits a crime to benefit himself and not the employer. There are unquestionably other factors that require consideration before faulting corporations for following a double standard. For example, those committing crimes of violence are inadequately trained and skilled as compared to white collar wrongdoers whose skills and contacts are often considerable. Those convicted because of the Watergate affair demonstrate this point. Yet, qualified ex-convicts are refused employment.

Misdemeanors are frequently considered to be less serious crimes than felonies. However, many misdemeanors are more injurious to society than felonies. A felony is legally defined as a crime calling for imprisonment in a state or federal penitentiary for one year or more while a misdemeanor requires imprisonment (or a fine) for less than a year in a county jail. In some crimes, the value of the property taken determines whether a felony or misdemeanor has been committed. The threat or use of physical force may also determine whether the crime is a felony or misdemeanor. Distinguishing between a felony and misdemeanor is not helpful if used to decide whether an ex-convict should be employed. Robbing a gasoline station of $1,000 at the point of a gun is a felony while price-fixing under the Sherman Act is a misdemeanor even if the public is bilked of millions of dollars. Persons refusing induction into the military, claiming the immorality of the war effort in Vietnam, were convicted of felonies while those entangling the

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[5] NRM Corp., 51 L.A. 177 (1968); Gardner-Denver Corp., 51 L.A. 1019 (1968); Vulcan Materials Co., 56 L.A. 469 (1971); Lone Star Gas Co., 56 L.A. 1221 (1971); National Floor Products Co., 58 L.A. 1015 (1972); Fairmont Gen. Hosp., 58 L.A. 1293 (1972); MSL Industries, Inc., 60 L.A. 322 (1973); Post Terminal Rd. Ass'n, 60 L.A. 430 (1973); Armark Abrasive Div., 60 L.A. 509 (1973); Nat. Steel Corp., 60 L.A. 613 (1973); U.S. Steel Corp., 41 L.A. 460 (1963); Cities Service Oil Co., 41 L.A. 1091 (1963); Mansfield Tire and Rubber Co., 31 L.A. 775 (1959).

United States, possibly illegally, are not investigated or brought to trial. Should convicted draft evaders, given these circumstances, be classified as felons when seeking a job?

Title VII and state fair employment laws are turned to by ex-offenders as a means of opening employment opportunities. To date, the express changes made in the fair employment laws to protect ex-convicts have been minimal. However, blacks seeking protection under the current legislation have experienced some success.

In *Green v. Mo. Pac. R.R. Co.*,[6] the plaintiff, black, sought employment as a clerk. The employer refused to hire any ex-convicts and the plaintiff, convicted for refusing induction into the military, was turned down. Following the rationale expressed in *Duke Power Co.*, the plaintiff claimed that the employer's refusal to hire ex-convicts had a negative impact upon black job hunters who were, percentagewise, more frequently convicted of a crime than white job hunters, thereby violating Title VII. The district court rejected the plaintiff's claim, noting that the blacks rejected because of criminal convictions only constituted two percent of the total number of job seekers, so that the impact of the employer's policy was minimal. The court, however, accepted the data presented by the plaintiff that nonwhite persons in metropolitan areas were convicted two or three times as often as white persons, that 37 percent to more than 78 percent of the black urban population were convicted of a crime compared to 11.6 to 16.8 percent for white persons.

The district court also considered the possibility that the statistical data presented established a prima facie violation of Title VII, but the defendant's refusal to hire ex-convicts was justified by "business necessity" as specified in *Duke Power Co*. The court noted the rate of recidivism, that more than 50 percent were convicted of a subsequent crime, cargo thefts within the firm, etc., to support the "business necessity" rationale. The court contended that the employer would be unfairly burdened if "(s)uch factors as nature of offense, length . . . of . . . punishment, remoteness . . . of . . . conviction . . . do not reasonably indicate . . . whether ex-offenders will be successful employees."

The appellate court reversed, pointing to the lower court error in evaluating the statistical data. While only 174 blacks convicted of crimes were rejected for employment sought by 5,206 whites and 3,282 blacks, the analysis suffered because "53 of every 1,000 black applicants" and only "22 of every 1,000 white applicants" were turned away. Consequently, the negative impact upon blacks residing in the metropolitan areas was two-and-a-half times greater than upon whites similarly located. The impact was, consequently, not minimal. The lower court analysis suffered because "(t)he issue to be examined statistically is whether the questioned employment practice operated in a disparate manner upon a minority race or group, not whether the individuals actually suffering from a discriminatory practice are statistically large in number."

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[6] 381 F. Supp. 992 (E.D. Mo., 1973), *reversed*, 523 F.2d 1290 (1975). Also see *Dozier v. Chupka*, 11 FEP Cases 1331 (U.S.D.C., S.D. Ohio, 1975) and *Jimerson v. Kisco Co.*, 11 FEP Cases 1420 (U.S.D.C., E.D., May, 1975).

Contrary to the lower court, the appellate court could not accept the finding of "business necessity." The appellate court did not feel that ex-convicts were less efficient or honest than others, citing decisions made under the Fourteenth Amendment to support this view.[7] The employer supported his "business necessity" claim by noting the theft of cargo, bonding requirements of the jobs, high rate of recidivism, plaintiffs history of violence and lack of moral character, etc. The appellate court could have pointed to, but didn't, the large amount of theft experienced by the employer who did not hire ex-convicts. Do ex-convicts, given these conditions, pose a greater threat to the employer? Seems unlikely. But the fears expressed were not substantiated by empirical data, and the employer did not prove that an alternative method having "a lesser racial impact" could not be used to select employees, the approach suggested by the EEOC and endorsed by the Supreme Court in *Albemarle Paper Co.* The appellate court could not believe that all ex-convicts should be denied employment as a matter of "business necessity," an artificial barrier to employment as prohibited in *Duke Power Co.*

The plaintiff in *Green* was convicted for refusing induction into the military, possibly due to the immorality of the Vietnamese war. While the patriotic may, perhaps justifiably, criticize those unwilling to enter the military, draft evaders are not criminals in the traditional sense. But even if draft dodgers are properly categorized as criminals, studies indicate that fear of company theft and recidivism is not justified.[8] Some employers incorrectly assume that all ex-offenders cannot be bonded, an excuse not to hire ex-offenders. The Department of Labor in 1966 initiated a program whereby the United States assumed the role of a guarantor to insurance carriers willing to bond ex-offenders. A study conducted of this federal program disclosed that ex-offenders bonded posed such a low risk that rate reduction was in order.[9]

The appellate court in *Green* did not specify circumstances when employment could be properly denied. However, it is reasonable to assume that in jobs where the temptation to steal would be great or public confidence is reasonably crucial, employment to ex-convicts could be refused. Balancing is necessary under these circumstances—the well-being of employers and the needs of ex-offenders to secure suitable employment. There are, however, few jobs where the needs of employers should tip the scale in their favor. The plaintiff in *Green* poses little or no risk, even for the most responsible of jobs, given the nature of the crime. The decision in *Green*, in tune with the will of Congress and EEOC regulations, forces employers to measure the individual and not the group in the abstract, as specified in *Duke Power Co.*

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[7] Carter v. Gallagher, 452 F.2d 315 (CA 8, 1971), *cert. denied,* 406 U.S. 950 (1972); Butts v. Nichols, 381 F. Supp. 573 (S.D. Ia., 1974). These cases will be subsequently reviewed.

[8] Carpenter, "The Federal Work Release Program," 4 *Nebraska Law Rev.* 690 (1966); Inst. of Crim. Law & Procedure, Georgetown Univ., *The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies* (1972).

[9] Manpower Adm., U.S. Dept. of Labor, *The Federal Bonding Program* (1971).

There is an element of unfairness if blacks (and women) can claim the protection of Title VII while white males are forced to rely upon employers and natural market forces unless joining blacks in a class action. While white ex-offenders could resort to the Fifth and Fourteenth Amendments in the public sector, claiming unequal protection or an absence of due process, private employers, with few exceptions, can only be reached under fair employment laws. Even the Hawaii legislation offers little, protecting those with an arrest record while the convicted are ignored legislatively.[10] The Hawaii legislation in fact protects the right of employers seeking information pertaining to criminal convictions.[11] Section 378-1(6) protects "only those (employees) brought in for questioning, detained, investigated, served with a summons" and "(c)onvictions" are not included,[12] the same protection as was granted under Title VII in *Litton*; the Hawaii legislators did not go as far as the appellate court did in *Green* under Title VII.

White and black women convicted of a crime may be able to take advantage of federal and state fair employment laws to assure equal opportunity. Women behind bars are less exposed to industrial training than men, limiting employment opportunities upon release. Employer, union, and publicly supported vocational training programs cannot be operated in a sexually discriminatory manner, prohibited by Title VII. Section 703(a)(2) prohibits sex discrimination which would "limit, segregate, or classify . . . employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his (sic) status as an employee. . . ." The same limitation is imposed upon unions in section 703(c)(2). In addition, section 703(d) forbids employers, unions, "or joint labor-management committee controlling apprenticeship or other training or retraining. . . ." to discriminate.

Prisons are not employers—they are not commercial ventures—and the relationship between the institution and the inmate is involuntary. Even if paid to work, whether as a trainee or in a specified job, the inmate is not an employee, at least in the traditional sense, of the prison. Hence, it is unlikely that the inequality of vocational training can be reached under Title VII because of sex discrimination where the prison requires participation in the work program. By way of analogy, athletes at a state university receiving athletic scholarships are not employees and cannot claim discrimination under Title VII. (However, university discrimination could be reached under the Fourteenth Amendment and Title IX enacted by Congress in 1972.) If job opportunities and training are sexually unequal in prisons, the Fifth or Fourteenth Amendment is a more promising means of ending the disparate treatment.

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[10] BNA, *Fair Employment Practice Manual* 451:285. See section 378-2(3).

[11] *Ibid.*, 451:297.

[12] *Ibid.*, 451:285.

There is a possibility that prisons could be held responsible under Title VII and state fair employment laws. Prison officials often function as an employment agency, facilitating the rehabilitation of convicts on work release programs or by helping them find jobs upon release. The original section 701(c) of Title VII excluded all state and federal agencies except "the United States Employment Service and the system of State and local services receiving Federal assistance." However, section 701(c) was amended in 1972 so that an "employment agency" means "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer. . . ." It seems that "person" is broad enough to include prisons and other private and public agencies. The key to responsibility under Title VII is "regularly"—if "regularly" helping convicts seeking employment, prisons could fall within the definition of an "employment agency." Section 703(b) then makes it an unfair "employment practice for an employment agency to fail or refuse to refer for employment" because of sex.

In Iowa, convicts can arrange, with the approval of prison officials, to work for private employers in a work release program.[13] Under these circumstances, prisons are not acting as employment agencies and would not fall within the definition of section 701(c). In addition, section 247A.8 of the Iowa Code provides that inmates are not employees, voluntary or involuntary, of the Iowa Department of Social Services. However, section 247A.8 does not state that the Department of Social Services, in operating the work release program, cannot function as an employment agency. If jailed for the commission of a misdemeanor, the Board of Supervisors of the jail can elect to treat the inmate as an employee who works in jail, on the highways, etc.[14] But the purpose thereof is to protect inmates injured on the job, entitling them to workmen's compensation benefits. it considered an employee for workmen's compensation benefits, it seems that employment opportunities for male and female inmates in county institutions should be equalized. A failure to provide equal opportunity could be a violation of the Iowa and federal fair employment laws.

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[13] *Iowa Code*, Ch. 247A.4 (1975).

[14] *Iowa Code*, Ch. 85.62 (1975).

In keeping with *Duke Power Co.*, it is not necessary to establish an intentional violation; "to fail" to refer is enough reason to impose legal responsibility. While a private employer was held responsible in *Duke Power Co.*, there is no reason to assume that public employers cannot be held responsible for the effect of unintentional discrimination. This raises the possibility that the failure to provide equal training opportunities for women ultimately reflects upon the function served by prisons as an "employment agency." To date, court decisions have not been reported in which this issue was raised.

Public Licensing and Public Employment

Ex-offenders are turning to the courts when denied a license to engage in certain occupations or denied public employment because of their past record. State laws often prohibit the licensing of ex-felons; public officials holding discretionary authority, determining whether a license should be granted, find moral character lacking in all ex-convicts. Some state laws prohibit the employment of ex-convicts or public officers exercising discretionary authority find ex-convicts unsuitable. Under these circumstances, ex-offenders may be unjustifiably denied license or public employment.

A license to practice an occupation or trade may be required by state law, justified to assure competency and/or moral character. Each state determines the occupations and trades to be licensed, conditions to be satisfied to secure a license, etc. The number of occupations and trades licensed is endless and the conditions imposed staggering—licenses are required for barbers, junk dealers, plumbers, doctors, lawyers, jockeys, etc. Where a high degree of proficiency and stringent moral standards are required, licensing may be justified. But many occupations do not seem to require such a high degree of proficiency or moral turpitude to warrant licensing or the stringent standards imposed; some, for example, are necessary to assure cleanliness and protect health. Yet, those issuing licenses fail to distinguish between occupations, the reasons for licensing, degrees of trust, etc. Those with a criminal record are often unable to secure licenses, past convictions automatically equated with immorality and untrustworthiness. To determine whether licenses should be granted, the person as well as the occupation should be evaluated in most instances.

Morality is difficult to define, a vague term the meaning of which changes with time and circumstance. All convicted of crimes are no longer considered immoral or beyond salvation, and public policy automatically prohibiting licensing is unjustifiable. For example, why should there be a public concern with the moral fitness of barbers and beauticians, occupations in which licensing may be unnecessary. Most professional athletes are not licensed and their morality is not considered a matter of public concern. Curiously, few occupations were licensed during the nineteenth and early twentieth centuries. After a New York statute authorizing the licensing of doctors was constitutionally upheld because of the confidential relationship with patients, barring ex-felons from practice, other legislation followed requiring the licensing of many other occupations.[15] The Supreme Court as late as 1953 could not find an improper exercise of police power when the license of a doctor was lifted who refused to produce confidential medical records to a congressional committee, a misdemeanor.[16]

A few years later the Supreme Court began looking more closely at state licensing standards and requirements, questioning whether police power was properly exercised. In a landmark decision receiving considerable publicity, *Schware v. Bd. of Bar Examiners*,[17] the New Mexico Bar Association ruled that the plaintiff was morally unfit to practice law because of his liberal philosophy and political activities that led to conviction. Unable to find a connection between his present moral fitness and past political activities and convictions, the Supreme Court decided that the plaintiff was entitled to be licensed in New Mexico. *Schware* points to the possibility that state statutes automatically barring ex-felons from a license are unconstitutional unless the state is able to establish "business necessity" or a link between past and present conduct. In licensing barbers and beauticians, the state cannot establish "business necessity" or that past convictions affect performance. Certainly the state cannot establish a need to regulate the moral fitness of barbers and beauticians. A more serviceable and constitutionally supportable policy would require the licensing of occupations where an unusual degree of responsibility and trust is required of licensees, where "business necessity" demands such a precaution. Even then, a blanket refusal to licencse all ex-convicts may be unwarranted.

More courts in the future will be asked to consider the constitutionality of state licensing statutes barring the employment of ex-convicts. These statutes should be closely scrutinized under the Fourteenth Amendment as a possible denial of equal protection or a lack of due process, a failure to measure the moral fitness of individual applicants.[18] An unconstitutional denial of due process can be established by submitting evidence of the unreasonable aspects of the state legislation.[19] Some ex-convicts are unreliable and untrustworthy just as there are women unwilling to work nights, in bars, or to lift more than 35 pounds. However, the current judicial and legislative approach requires evaluation of the individual and ex-convicts are reliable and morally fit. Consequently, an irrebuttable or near irrebuttable presumption of moral incapacity is not due process, a lack of fair play, an unreasonable approach. However onerous and time-consuming evaluation may be, the Fourteenth Amendment requires consideration of the individual.[20]

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[15] Hawker v. N.Y., 170 U.S. 189 (1898).

[16] Barsky v. Bd. of Regents, 347 U.S. 442 (1953).

[17] 353 U.S. 233 (1957).

[18] Pordium v. Bd. of Regents, 491 F.2d 1281 (CA 2, 1974); Miller v. Dist. of Col. Bd. of Appeals, 294 A.2d 365 (1972); State v. Warren, 252 N.C. 69, 114 S.E. 2d 680 (1960); State v. Lawrence, 213 N.C. 674, 197 S.E. 586 (1938).

State licensing boards failing to list objective criteria to measure moral fitness and efficiency may be guilty of violating the due process clause. Agencies are being forced to list reasonable qualifications, permitting the fair evaluation of ex-convicts. In addition, procedural due process calls for a fair hearing and reasons supplied to ex-convicts when denied a license. The criminal offender is then given an opportunity to convince the licensing agency that it has erred. Otherwise, a presumption arises that ex-convicts are denied procedural due process.[21]

The meaning of equal protection is fluid, requiring equal, or near equal, treatment in the absence of evidence that inequality is essential. While it may be necessary to deny some jobs to ex-convicts, depending upon the crime and person, blanket denials are difficult to justify.[22] Section 8 of the New York Commission Waterfront Act of 1953 prohibited the collection of dues, fines, and initiation fees by union officials convicted of a felony unless pardoned or receiving "a certificate of good conduct from the board of parole. . . ." In fact, longshore officials were required to be licensed. The plaintiff in 1920 received a suspended sentence after being convicted of grand larceny. Because he was never pardoned or awarded "a certificate of good conduct," the plaintiff was suspended from his job.[23]

The legislation was enacted after an extensive investigation exposed considerable corruption in the Longshoremen's Union. While the legislative findings and need for the law were not disputed, the plaintiff claimed a denial of due process, barred from a job held since 1950 as secretary-treasurer because he was not pardoned or certified by a parole board. There was merit to the plaintiff's claim because more than 30 years had elapsed from the date of conviction and he was removed from office without evidence produced that he had engaged in wrongdoing. The Supreme Court nevertheless concluded that the legislation was reasonable given the extent of corruption on the waterfront. Suffice to note, the waterfront situation in New York was unusual, although the New Orleans waterfront today (grain pollution, false grading and weighing, etc.) is similar. It may well be that legislation of this type enacted today would be considered a violation of due process.

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[19] *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), reviewed in the section on sex discrimination, is a good example of the current Supreme Court attitude toward state legislation that cannot be supported by fact.

[20] Pavone v. La. State Bd. of Barber Examiners, 364 F. Supp. 961 (E.D. La., 1973); Leary v. U.S., 385 U.S. 6 (1969); Tot v. U.S., 319 U.S. 463 (1943).

[21] Freitag v. Carter, 489 F.2d 1337 (CA 7, 1973); Roper v. Lucey, 488 F.2d 748 (CA 1, 1973); Bell v. Burson, 402 U.S. 535 (1971); Wisc. v. Constantineau, 400 U.S. 433 (1971); Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

[22] De Veau v. Braisted, 363 U.S. 144 (1960).

[23] The question of federal preemption is not considered in the text.

More recently, state statutes have been invalidated denying aliens the right to be licensed.[24] In each instance, the state was unable to establish a reasonable relationship between the problem and the restrictions imposed by the legislation. Unlike the waterfront decision, the individual today must be measured, as specified in *Duke Power Co.*

A similar problem was recently adjudicated in Iowa, although a licensing statute was not involved. In *Butts v. Nichols*,[25] a class action was initiated by black and white felons challenging the constitutionality of an Iowa statute prohibiting the employment of ex-felons in civil service jobs, claimed to be a denial of equal protection of the law.[26] Agreeing with the plaintiffs, the district court ruled that a compelling state interest must be established to support the law where the criteria are suspect; because all felons were barred from public jobs, the criteria were suspect. Presumably, such a strong interest existed in the waterfront case. A more reasonable approach, and still protecting the public interest, would require an evaluation of the job and the ex-felon seeking it. The court would not take the position, as urged by the plaintiffs, that legislation barring employment in specific industries or jobs would constitute a denial of equal protection of law. However, a denial of all civil service jobs was unnecessary, unreasonable, and unconstitutional.

The Iowa legislation is indefensible, its only justification being that hiring agencies would not be required to exercise judgment and support decisions with reason. In light of recent studies made after the waterfront legislation was declared constitutional, pointing to the efficiency and integrity of ex-convicts, it appears that legislation prohibiting all hiring is doomed. Because blacks were plaintiffs, the same conclusion would have been reached under Title VII if a complaint were brought to the EEOC. Blacks complaining would succeed under Title VII, and blacks and whites bringing a class action would also succeed if for no other reason than the outlawing of racial and reverse discrimination. But if whites alone sought the help of the EEOC, the ability to win a judgment is less certain. Thus, the avenue most likely to lead to success if white ex-convicts seek federal or state employment is the Fifth and Fourteenth Amendments. There is, if not a constitutional question, a problem of fairness that borders on the bizarre—black ex-convicts seeking public or private employment are entitled to aid under Title VII, while white ex-convicts may be without recourse. Should black ex-convicts succeed under Title VII, it would be interesting to see if white ex-convicts making a complaint against the same employer would succeed.

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[24] In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

[25] 381 F. Supp. 573 (D.C. Ia., 1974).

[26] The plaintiffs also claimed that the Iowa statute was contrary to Title VII and a denial of due process.

A decision similar to *Litton* and *Butts* was made in *Carter v. Gallagher*.[27] Commenting on the propriety of a municipality seeking information pertaining to arrests and convictions from job seekers, the appellate court ruled that it was improper to request information of arrests, but seeking information of convictions was proper, bearing upon the suitability of the applicant. Contrary to *Litton*, a decision made under Title VII in which the employer was not forbidden to seek information from public sources of past arrests leading to trial, the lower and appellate courts agreed in *Carter* that a public agency had no need to secure this information. But the lower and appellate courts in *Carter* differed on past convictions—the lower court felt that information pertaining to felonies more than five years ago and misdemeanors more than two years ago was not needed to determine suitability, a position which the appellate court disagreed with, leading to reversal. Sitting *en banc*, the appellate court felt that the Fourteenth Amendment would be violated if all ex-convicts would be barred from jobs as firemen, but the complete conviction record of each applicant was information that the proper agency was entitled to if fitness were to be determined.

A Wisconsin court considered, under the state fair employment law, a question regarding private employers who denied employment because of arrest and conviction records.[28] The court held that an employer could consider all convictions, however distant, in making a decision. Thus, the Wisconsin Commission could not limit the consideration of convictions to those of recent origin. In this case, the bus company discharged a black driver in contact with the public who was involved in an altercation in which he drew a gun while participating in a crooked dice game. His past convictions indicated, evidently, an instability of character for an employee in contact with the public.

Another possible means of securing licenses and opening jobs in the public sector is the Eighth Amendment forbidding cruel and excessive punishment. Claims can be presented that refusing a license or employment to ex-offenders deprives them, after having been punished by imprisonment, from earning a living and pursuing a career of their choice. Convicting people of crimes and subsequently placing them under a civil disability is "pouring it on," at least in the absence of "business necessity," a position that has received court endorsement.[29] But reliance by ex-convicts on the Eighth Amendment has been successful only when the civil disability is imposed at the same time as the sentencing for the commission of the crime as required by statute, the civil punishment considered cruel and excessive. However, when the criminal and civil statutes are independent, the civil statute only denying licenses or public employment to ex-offenders released from prison, the punishment is not considered cruel or excessive. For this reason, licensing statutes and public employment denials are not challenged under the Eighth Amendment, but under the Fifth and Fourteenth Amendments.

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[27] 452 F.2d 315 (CA 8, 1971), *cert. denied*, 406 U.S. 950 (1972).

[28] Milwaukee & Suburban Transport Corp. v. Wisc. Dept. of Human Relations, 7 FEP Cases 261 (Wisc. Cir. Ct., 1973).

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[29] Weems v. U.S., 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1968); In re Griffiths, 413 U.S. 717 (1973).

APPENDIX

United States Constitution

Fifth Amendment

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

Thirteenth Amendment

"Neither slavery nor involuntary servitude . . . shall exist within the United States . . ."

Fourteenth Amendment

"[N]o State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

CLEVELAND BOARD OF EDUCATION v. LAFLEUR

6 FEP Cases 1253 (Sup. Ct. 1974)

Mr. Justice STEWART delivered the opinion of the Court.

The respondents . . . are female public school teachers. During the 1970-1971 school year, each informed her local school board that she was pregnant; each was compelled by a mandatory maternity leave rule to quit her job without pay several months before the expected birth of her child. These cases call upon us to decide the constitutionality of the school boards' rules.

Jo Carol LaFleur and Ann Elizabeth Nelson, the respondents in No. 72-777, are junior high school teachers employed by the Board of Education of Cleveland, Ohio. Pursuant to a rule first adopted in 1952, the school board requires every pregnant school teacher to take a maternity leave without pay, beginning five months before the expected birth of her child. Application for such leave must be made no later than two weeks prior to the date of departure. A teacher on maternity leave is not allowed to return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months. A doctor's certificate attesting to the health of the teacher is a prerequisite to return; an additional physical examination may be required. The teacher on maternity leave is not promised re-employment after the birth of the child; she is merely given priority in reassignment to a position for which she is qualified. Failure to comply with the mandatory maternity leave provisions is grounds for dismissal.

Neither Mrs. LaFleur nor Mrs. Nelson wished to take an unpaid maternity leave; each wanted to continue teaching until the end of the school year. Because of the mandatory maternity leave rule, however, each was required to leave her job in March of 1971. The two women then filed separate suits in the United States District Court for the Northern District of Ohio under 42 U.S.C. § 1983, challenging the constitutionality of the maternity leave rule. . . .

The petitioner, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia. That school board's maternity leave regulation requires that a pregnant teacher leave work at least four months prior to the expected birth of her child. Notice in writing must be given to the school board at least six months prior to the expected birth date. A teacher on maternity leave is declared re-eligible for employment when she submits written notice from a physician that she is physically fit for re-employment, and when she can give assurances that care of the child will cause minimal interferences with her job responsibilities. The teacher is guaranteed re-employment no later than the first day of the school year following the date upon which she is declared re-eligible.

Mrs. Cohen informed the Chesterfield County School Board in November 1970, that she was pregnant and expected the birth of her child about April 28, 1971. She initially requested that she be permitted to continue teaching until April 1, 1971. The school board rejected the request, as it did Mrs. Cohen's subsequent suggestion that she be allowed to teach until January 21, 1971, the end of the first school semester. Instead, she was required to leave her teaching job on December 18, 1970. She subsequently filed this suit under 42 U.S.C. § 1983 in the United States District Court. . . .

We granted certiorari in both cases, in order to resolve the conflict between the courts of appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers. This court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . .

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man," the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us in these cases is whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards can justify the particular procedures they have adopted.

The school boards in these cases have offered two essentially overlapping explanations for their mandatory maternity leave rules. First, they contend that the firm cut-off dates are necessary to maintain continuity of classroom instruction, since advance knowledge of when a pregnant teacher must leave facilitates the finding and hiring of a qualified substitute. Secondly, the school boards seek to justify their maternity rules by arguing that at least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy. By keeping the pregnant teacher out of the classroom during these final months, the maternity leave rules are said to protect the health of the teacher and her unborn child, while at the same time assuring that students have a physically capable instructor in the classroom at all times.

It cannot be denied that continuity of instruction is a significant and legitimate educational goal. Regulations requiring pregnant teachers to provide early notice of their condition to school authorities undoubtedly facilitate administrative planning toward the important objective of continuity. But, as the Court of Appeals for the Second Circuit noted in Green vs. Waterford Board of Education. . . .

> Where a pregnant teacher provides the Board with a date certain for commencement of leave, however, that value [continuity] is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the latter . . . would afford the Board more, not less, time to procure a satisfactory long-term substitute.

Thus, while the advance notice provisions in the Cleveland and Chesterfield County rules are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth month of pregnancy are not. Were continuity the only goal, cut-off dates much later during pregnancy would serve as well or better than the challenged rules, providing that ample advance notice requirements were retained. Indeed, continuity would seem just as well attained if the teacher herself were allowed to choose the date upon which to commence her leave, at least so long as the decision were required to be made and notice given of it well in advance of the date selected.

In fact, since the fifth or sixth months of pregnancy will obviously begin at different times in the school year for different teachers, the present Cleveland and Chesterfield County rules may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote. For example, the beginning of the fifth month of pregnancy for both Mrs. LaFleur and Mrs. Nelson occurred during March of 1971. Both were thus required to leave work with only a few months left in the school year, even though both were fully willing to serve through the end of the term. Similarily, if continuity were the only goal, it seems ironic that the Chesterfield County rule forced Mrs. Cohen to leave work in mid-December 1970 rather than at the end of the semester in January, as she requested.

We thus conclude that the arbitrary cut-off dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teacher is required to give substantial advance notice of her condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

The question remains as to whether the fifth and sixth month cut-off dates can be justified on the other ground advanced by the school boards—the necessity of keeping physically unfit teachers out of the classroom. There can be no doubt that such an objective is perfectly legitimate, both on educational and safety grounds. And, despite the plethora of conflicting medical testimony in these cases, we can assume *arguendo* that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.

The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

As the Court noted last Term . . . "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." In Vlandis, the Court declared unconstitutional, under the Due Process Clause, a Connecticut statute mandating an irrebuttable presumption of nonresidency for the purposes of qualifying for reduced tuition rates at a state university. We said in that case,

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination.

These principles control our decision in the cases before us. While the medical experts in these cases differed on many points, they unanimously agreed on one—the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter. Even assuming *arguendo* that there are some women who would be physically unable to work past the particular cut-off dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus, the conclusive presumption embodied in these rules, like that in Vlandis, is neither "necessarily nor universally true," and is violative of the Due Process Clause.

The school boards have argued that the mandatory termination dates serve the interest of administrative convenience, since there are many instances of teacher pregnancy, and the rules obviate the necessity for case-by-case determinations. Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives in this area. But, as the Court stated in Stanley v. Illinois . . .

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.

We conclude, therefore, that neither the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.

In addition to the mandatory termination provisions, both the Cleveland and Chesterfield County rules contain limitations upon a teacher's eligibility to return to work after giving birth. Again, the school boards offer two justifications for the return rules—continuity of instruction and the desire to be certain that the teacher is physically competent when she returns to work. As is the case with the leave provisions, the question is not whether the school board's goals are legitimate, but rather whether the particular means chosen to achieve those objectives unduly infringe upon the teachers' constitutional liberty.

Under the Cleveland rule, the teacher is not eligible to return to work until the beginning of the next regular school semester following the time when her child attains the age of three months. A doctor's certificate attesting to the teacher's health is required before return; an additional physical examination may be required at the option of the school board.

The respondents do not seriously challenge either the medical requirements of the Cleveland rule or the policy of limiting eligibility to return to the next semester following birth. The provisions concerning a medical certificate or supplemental physical examination are narrowly drawn methods of protecting the school board's interest in teacher fitness; these requirements allow an individualized decision as to teachers' condition, and thus avoid the pitfalls of the presumptions inherent in the leave rules. Similarly, the provision limiting eligibility to return to the semester following delivery is a precisely drawn means of serving the school board's interest in avoiding unnecessary changes in classroom personnel during any one school term.

The Cleveland rule, however, does not simply contain these reasonable medical and next-semester eligibility provisions. In addition, the school board requires the mother to wait until her child reaches the age of three months before the return rules begin to operate. The school boards have offered no reasonable justification for this supplemental limitation, and we can perceive none. To the extent that the three months provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules. The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the school's interests in this regard. And finally, the three month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher.

Thus, we conclude that the Cleveland return rule, insofar as it embodies the three months age provision, is wholly arbitrary and irrational, and hence violates the Due Process Clause of the Fourteenth Amendment. The age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children.

We perceive no such constitutional infirmities in the Chesterfield County rule. In that school system, the teacher becomes eligible for reemployment upon submission of a medical certificate from her physician; return to work is guaranteed no later than the beginning of the next school year following the eligibility determination. The medical certificate is both a reasonable and narrow method of protecting the school board's interest in teacher fitness, while the possible deferring of return until the next school year serves the goal of preserving continuity of instruction. In short, the Chesterfield County rule manages to serve the legitimate state interests here without employing unnecessary presumptions that broadly burden the exercise of protected constitutional liberty.

For the reasons stated, we hold that the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty. For similar reasons, we hold the three months' provision of the Cleveland return rule unconstitutional.

ALBEMARLE PAPER CO. v. MOODY

10 FEP Cases 1181 (1975)

Mr. Justice STEWART delivered the opinion of the Court.

These consolidated cases raise two important questions. . . . Second: What must an employer show to establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently "job related" to survive challenge under Title VII?

At the trial, in July and August of 1971, the major issues were the plant's seniority system, its program of employment testing, and the question of backpay. In its opinion of November 9, 1971, the court found that the petitioners had "strictly segregated" the plant's departmental "lines of progression" prior to January 1, 1964, reserving the higher paying and more skilled lines for whites. The "racial identifiability" of whole lines of progression persisted until 1968, when the lines were reorganized under a new collective-bargaining agreement. The court found, however, that this reorganization left Negro employees "locked in the lower paying job classifications." The formerly "Negro" lines of progression had been merely tacked on to the bottom of the formerly "white" lines, and promotions, demotions, and layoffs continued to be governed—where skills were "relatively equal"—by a system of "job seniority." Because of the plant's previous history of overt segregation, only whites had seniority in the higher job categories. Accordingly, the court ordered the petitioners to implement a system of "plantwide" seniority.

The court refused, however, to award backpay to the plaintiff class for losses suffered under the "job seniority" program. The court explained:

> In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. . . .
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> In addition, an award of back pay is equitable remedy. . . . The plaintiff's claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. . . .

The court also refused to enjoin or limit Albemarle's testing program. Albemarle had required applicants for employment in the skilled lines of progression to have a high school diploma and to pass two tests, the Revised Beta Examination, allegedly a measure of nonverbal intelligence, and the Wonderlic Test (available in alternate Forms A and B), allegedly a measure of verbal facility. After this Court's decision in *Griggs v. Duke Power Company,* and on the eve of trial, Albemarle engaged an industrial psychologist to study the "job relatedness" of its testing program. His study compared the test scores of current employees with supervisorial judgments of their competence in ten job groupings selected from the middle or top of the plant's skilled lines of progression. The study showed a statistically significant correlation with supervisorial ratings in three job groupings for the Beta test, in seven job groupings for either Form A or Form B of the Wonderlic Test, and in two job groupings for the required battery of both the Beta and the Wonderlic Test. The respondents' experts challenged the reliability of these studies, but the court concluded:

> The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried their burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirement is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for job classifications. . . .

. . . A divided Court of Appeals for the Fourth Circuit reversed the judgment of the District Court, ruling that backpay should have been awarded and that use of the tests should have been enjoined. As for backpay, the Court of Appeals held that an award could properly be requested after the complaint was filed and that an award could not be denied merely because the employer had not acted in "bad faith,"

> Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. . . . Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.

As for the pre-employment tests, the court of appeals held that it was error

> to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression.

In so holding the Court of Appeals "gave great deference" to the "Guidelines on Employee Selection Procedures," 29 CFR Part 1607, which the EEOC has issued "as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations of Title VII. . . ."

. . . As the Court observed in *Griggs v. Duke Power Co.*, the primary objective was a prophylactic one:

> It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. . . ."

It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. . . . Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. . . ."

The "make whole" purpose of Title VII is made evident by the legislative history. The backpay provision was expresssly modeled on the backpay provision of the National Labor Relations Act. Under that Act, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. . . ."

We may assume that Congress was aware that the Board, since its inception, has awarded backpay as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious or inexcusable. Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award backpay. These limiting efforts were rejected, and the backpay provision was re-enacted substantially in its original form. . . .

It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that Albemarle's breach of Title VII had not been in "bad faith." This is not a sufficient reason for denying backpay. Where an employer *has* shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith. . . ."

In *Griggs v. Duke Power Co.*, this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question. . . ."

To condition the awarding of backpay on a showing of "bad faith" would be to open an enormous chasm between injunctive and backpay relief under Title VII. There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies. . . .

Like the employer in *Griggs*, Albemarle uses two general ability tests, the Beta Examination, to test nonverbal intelligence, and the Wonderlic Test (Forms A and B), the purported measure of general verbal facility which was also involved in the Griggs case. Applicants for hire into various skilled lines of progression at the plant are required to score 100 on the Beta Exam and 18 on one of the Wonderlic Test's two, alternate forms.

The question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program. The plant, which now employs about 650 persons, converts raw wood into paper products. It is organized into a number of functional departments, each with one or more distinct lines of progression, the theory being that workers can move up the line as they acquire the necessary skills. The number and structure of the lines has varied greatly over time. For many years, certain lines were themselves more skilled and paid higher wages than others, and until 1964 these skilled lines were expressly reserved for white workers. In 1968, many of the unskilled "Negro" lines were "end-tailed" on to skilled "white" lines, but it apparently remains true that at least the top jobs in certain lines require greater skills than the top in other lines. In this sense, at least, it is still possible to speak of relatively skilled and relatively unskilled lines.

In the 1950s while the plant was being modernized with new and more sophisticated equipment, the company introduced a high school diploma requirement for entry into the skilled lines. Though the company soon concluded that this requirement did not improve the quality of the labor force, the requirement was continued until the District Court enjoined its use. In the late 1950s, the company began using the Beta Examination and the Bennett Mechanical Comprehension Test (also involved in the Griggs case) to screen applicants for entry into the skilled lines. The Bennett test was dropped several years later, but use of the Beta test continued.

The company added the Wonderlic Test in 1963, for the skilled lines, on the theory that a certain verbal intelligence was called for by the increasing sophistication of the plant's operations. The company made no attempt to validate the test for job relatedness, and simply adopted the national "norm" score of 18 as a cutoff point for new job applicants. After 1964, when it discontinued overt segregation of the lines of progression, the company allowed Negro workers to transfer to the skilled lines if they could pass the Beta and Wonderlic Tests, but few succeeded in doing so. Incumbents in the skilled lines, some of whom had been hired before adoption of the tests, were not required to pass them to retain their jobs or their promotion rights. The record shows that a number of white incumbents in high ranking job groups could not pass the tests.

Because departmental reorganization continued up to the point of trial, and has indeed continued since that point, the details of the testing program are less than clear from the record. The District Court found that, since 1963, the Beta and Wonderlic tests have been used in 13 lines of progression, within eight departments. Albemarle contends that at present the tests are used in only eight lines of progression, within four departments.

Four months before this case went to trial, Albemarle engaged an expert in industrial psychology to "validate" the job relatedness of its testing program. He spent a half day at the plant and devised a "concurrent validation" study, which was conducted by plant officials, without his supervision. The expert then subjected the results to statistical analysis. The study dealt with ten job groupings, selected from near the top of the nine of the lines of progression. Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of the particular skills they might require. All, or nearly all, employees in the selected groups participated in the study—105 employees in all, but only four Negroes. Within each job grouping, the study compared the test scores of each employee with an independent "ranking" of the employee, relative to each of his co-workers, made by two of the employee's supervisors. The supervisors, who did not know the test scores, were asked to

> determine which ones they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against. . . .

For each job grouping, the expert computed the "Phi coefficient" of statistical correlation between the test scores and an average of the two supervisorial rankings. Consonant with professional conventions, the expert regarded as "statistically significant" any correlation that could have occurred by chance only five times, or less, in 100 trials. On the basis of these results, the District Court found that "[t]he personnel tests administered at the plant have undergone validation studies and have been proven to be job related." Like the Court of Appeals, we are constrained to disagree.

The EEOC has issued "Guidelines" for employers seeking to determine, through professional validation studies, whether their employment tests are job-related. These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association. The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference."

The message of these Guidelines is the same as that of the Griggs case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."

Measured against the Guidelines, Albemarle's validation study is materially defective in several respects:

(1) Even if it had been otherwise adequate, the study would not have "validated" the Beta and Wonderlic test battery for all of the skilled lines of progression for which the two sets are, apparently, now required. The study showed significant correlations for the Beta Exam in only three of the eight lines. Though the Wonderlic Test's Form A and Form B are in theory identical and interchangeable measures of verbal facility, significant correlations for one Form but not for the other were obtained in four job groupings. In two job groupings neither Form showed a significant correlation. Within some of the lines of progression, one Form was found acceptable for some

job groupings but not for others. Even if the study were otherwise reliable, this odd patchwork of results would not entitle Albemarle to impose its testing program under the Guidelines. A test may be used in jobs other than those for which it has been professionally validated only if there are "no signficant differences" between the studied and unstudied jobs. The study in this case involved no analysis of the attributes of, or the particular skills needed in, the studied job groups. There is accordingly no basis for concluding that "no significant differences" exist among the lines of progression, or among distinct job groupings within the studied lines of progression. Indeed, the study's checkered results appear to compel the opposite conclusion.

(2) The study compared test scores with subjective supervisorial rankings. While they allow the use of supervisorial rankings in test validation, the Guidelines quite plainly contemplate that the rankings will be elicited with far more care than was demonstrated here. Albemarle's supervisors were asked to rank employees by a "standard" that was extremely vague and fatally open to divergent interpretations. Each "job grouping" contained a number of different jobs, and the supervisors were asked, in each grouping, to

> determine which ones [employees] they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against. . . .

There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria—or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind. There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

(3) The company's study focused, in most cases, on job groups near the top of the various lines of progression. In *Griggs v. Duke Power Co.*, supra, the Court left open "the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need." The Guidelines take a sensible approach to this issue, and we now endorse it:

> If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant

> ways, it shall be considered that candidates are being evaluated for a job at or near the entry level.

The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers, entering lower level jobs. In drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low-level jobs. The District Court made no findings on these issues. The issues take on special importance in a case, such as this one, where incumbent employees are permitted to work at even high-level jobs without passing the company's test battery.

(4) Albemarle's validation study dealt only with job-experienced, white workers: but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite. The Standards of the American Psychological Association state that it is "essential" that

> [t]he validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice.

The EEOC Guidelines likewise provide that "[d]ata must be generated and results separately reported for minority or non-minority groups wherever technically feasible." In the present case, such "differential validation" as to racial groups was very likely not "feasible," because years of discrimination at the plant have insured that nearly all of the upper level employees are white. But there has been no clear showing that differential validation was not feasible for lower-level jobs. More importantly, the Guidelines provide:

> If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.
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> [E]vidence of satisfactory validity based on other groups will be regarded as only provisional compliance with the guidelines pending separate validation of the test for the minority groups in question.

For all these reasons, we agree with the Court of Appeals that the District Court erred in concluding that Albemarle had proved the job relatedness of its testing program and that the respondents were consequently not entitled to equitable relief. The outright reversal by the Court of Appeals implied that an injunction should immediately issue against all use of testing at the plant. Because [of] the particular circumstances of this case, however, it appears that the more prudent course is to leave to the District Court the precise fashioning of the necessary relief in the first instance. During the appellate stages of this litigation, the plant has apparently been amending its departmental organization and the use made of its tests. The appropriate standard of proof for job relatedness has not been clarified until today. Similarly, the respondents have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a "pretext" for discrimination in light of alternative selection procedures available to the company. We also note that the Guidelines authorize provisional use of tests, pending new validation efforts, in certain very limited circumstances. Whether such circumstances now obtain is a matter best decided, in the first instance, by the District Court. That court will be free to take such new evidence, and to exercise such control of the company's use and validation of employee selection procedures, as are warranted by the circumstances and by the controlling law.

Accordingly, the judgment is vacated, and these cases are remanded to the District Court for proceedings consistent with this opinion. . . .

FRANKS v. BOWMAN TRANSPORTATION CO.

12 FEP Cases 549 (Sup. Ct., 1976)

Mr. Justice BRENNAN delivered the opinion of the Court.

This case presents the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964 . . . may be awarded seniority status retroactive to the dates of their employment applications.

. . . Petitioner Lee intervened on behalf of himself and others similarly situated alleging racially discriminatory hiring and discharge policies limited to Bowman's employment of over-the-road (OTR) truck drivers. Following trial, the District Court found Bowman had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees, and found further that the discriminatory practices were perpetrated in Bowman's collective-bargaining agreement with the unions. . . . In its final order and decree, the District Court subdivided the class represented by petitioner Lee into a class of black nonemployee applicants for OTR positions prior to January 1, 1972 (class 3), and a class of black employees who applied to transfer to OTR positions prior to the same date (class 4). . . .

The Court of Appeals held that the District Court had exercised its discretion under an erroneous view of law insofar as it failed to award backpay to the unnamed class members of both classes 3 and 4, and vacated the judgment in that respect. The judgment was reversed insofar as it failed to award any seniority remedy to the members of class 4 who after the judgment of the District Court sought and obtained priority consideration for transfer to OTR positions. As respects unnamed members of class 3—nonemployee black applicants who applied for and were denied OTR prior to January 1, 1972—the Court of Appeals affirmed the District Court's denial of any form of seniority relief. Only this last aspect of the Court of Appeals' judgment is before us for review under our grant of the petition for certiorari.

In affirming the District Court's denial of seniority relief to the class 3 group of discriminatees, the Court of Appeals held that the relief was barred by § 703(h) of Title VII. We disagree. Section 703(h) provides in pertinent part that:

> Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

The Court of Appeals reasoned that a discriminatory refusal to hire "does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as 'not an unlawful employment practice' [by § 703(h)]." Significantly, neither Bowman nor the unions undertake to defend the Court of Appeals' judgment on that ground. It is clearly erroneous.

The black applicants for OTR positions composing class 3 are limited to those whose applications were put in evidence at the trial. The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. It is this context that must shape our determination as the meaning and effect of § 703(h).

On its face, § 703(h) appears to be only a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703 (h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g), in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g). . . . We therefore hold that the Court of Appeals erred in concluding that, as a matter of law, § 703(h) barred the award of seniority relief to the unnamed class 3 members.

There remains the question whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, § 706(g).

We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. . . . Congress in § 706(g) vested broad equitable discretion in the federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . ., or any other relief as the court deems appropriate." The legislative history supporting the 1972 Amendments of § 706(g) of Title VII affirms the breadth of this discretion. "The provisions of [Section 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." . . . This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring. Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "makewhole" purposes of the Act. . . .

Seniority standing in employment with respondent Bowman, computed from the departmental date of hire, determines the order of layoff and recall of employees. Further, job assignments for OTR drivers are posted for competitive bidding and seniority is used to determine the highest bidder. As OTR drivers are paid on a per-mile basis, earnings are therefore to some extent a function of seniority. Additionally, seniority computed from the company date-of-hire determines the length of an employee's vacation and pension benefits. Obviously merely to require Bowman to hire the class 3 victim of discrimination falls far short of a "makewhole" remedy. A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time at which he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.

The Court of Appeals apparently followed this reasoning in holding that the District Court erred in not granting seniority relief to class 4 Bowman employees who were discriminatorily refused transfer to OTR positions. Yet the class 3 discriminatees in the absence of a comparable seniority award would also remain subordinated in the seniority system to the class 4 discriminatees. The distinction plainly finds no support anywhere in Title VII or its legislative history. Settled law dealing with the related "twin" areas of discriminatory hiring and discharges violative of the National Labor Relations Act, provides a persuasive analogy. "[I]t would indeed be surprising if Congress gave a remedy for the one which it denied for the other." For courts to differentiate without justification between the classes of discriminatees "would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed."

Similarly, decisions construing the remedial section of the National Labor Relations Act, the model for § 706(g), Albemarle Paper—make clear that remedies constituting authorized "affirmative action" include an award of seniority status, for the thrust of "affirmative action" redressing the wrong incurred by an unfair labor practice is to make "the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act]." The task of the NLRB in applying § 10(c) is "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." . . . And the NLRB has often required that the hiring of employees who had been discriminatorily refused employment be accompanied by an award of seniority equivalent to that which they would have enjoyed but for the illegal conduct. . . . Plainly the "affirmative action" injunction of § 706(g) has no lesser reach in the district courts. "Where racial discrimination is concerned, 'the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'"

We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts. Respondent Bowman attempts to justify the District Court's denial of seniority relief for petitioners as an exercise of equitable discretion, but the record is its own refutation of the argument.

Albemarle Paper made clear that discretion imports not the court's "inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles." Discretion is vested not for purposes of "limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice," but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case. Accordingly, the District Court's denial of any form of seniority remedy must be reviewed in terms of its effect on the attainment of the Act's objectives under the circumstances presented by this record. No less than with the denial of the remedy of backpay, the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."

The District Court stated two reasons for its denial of seniority relief for the unnamed class members. The first was that those individuals had not filed administrative charges under the provisions of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in Albemarle Paper, and for the same reasons reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected that construction by the 1972 Amendments. . . .

The second reason stated by the District Court was that such claims "presuppose a vacancy, qualification, and performance by every member. There is no evidence on which to base these multiple conclusions." The Court of Appeals rejected this reason insofar as it was the basis of the District Court's denial of backpay, and of its denial of retroactive seniority relief to the unnamed members of class 4. We hold that it is also an improper reason for denying seniority relief to the unnamed members of class 3.

We read the District Court's reference to the lack of evidence regarding a "vacancy, qualification and performance" for every individual member of the class as an expression of concern that some of the unnamed class members (unhired black applicants whose employment applications were summarized in the record) may not in fact have been actual victims of racial discrimination. That factor will become material however only when those persons reapply for OTR positions pursuant to the hiring relief ordered by the District Court. Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class. Rather, at such time as individual class members seek positions as OTR drivers, positions for which they are presumptively entitled to priority hiring consideration under the District Court's order, evidence that particular individuals were not in fact victims of racial discrimination will be material. But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. . . . Only if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members.

Respondent Bowman raises an alternative theory of justification. Bowman argues that an award of retroactive seniority to the class of discriminatees will conflict with the economic interests of other Bowman employees. Accordingly, it is argued, the District Court acted within its discretion in denying this form of relief as an attempt to accommodate the competing interests of the various groups of employees.

We reject this argument for two reasons. First, the District Court made no mention of such considerations in its order denying the seniority relief. As we noted in Albemarle Paper, if the District Court declines due to the peculiar circumstances of the particular case to award relief generally appropriate under Title VII, "[i]t is necessary . . . that . . . it carefully articulate its reasons" for so doing. Second and more fundamentally, it is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "makewhole" objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."

With reference to the problems of fairness or equity respecting the conflicting interests of the various groups of employees, the relief which petitioners seek is only seniority status retroactive to the date of individual application, rather than some form of arguably more complete relief. No claim is asserted that nondiscriminatee employees holding OTR positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned. It is therefore clear that even if the seniority relief petitioners seek is awarded, most if not all discriminatees who actually obtain OTR jobs under the court order will not truly be restored to the actual seniority that would have existed in the absence of the illegal discrimination. Rather, most discriminatees even under an award of retroactive seniority status will still remain subordinated in the hierarchy to a position inferior to that of a greater total number of employees than would have been the case in the absence of discrimination. Therefore, the relief which petitioners seek, while a more complete form of relief than that which the District Court accorded, in no sense constitutes "complete relief." Rather, the burden of the past discrimination in hiring is with respect to competitive status benefits divided among discriminatee and nondiscriminatee employees under the form of relief sought. The dissent criticizes the Court's result as not sufficiently cognizant that it will "directly implicate the rights and expectations of perfectly innocent employees." We are of the view, however, that the result which we reach today—which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."

Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. . . . The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. . . . And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests. . . .

In holding that class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under § 706(g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII "implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are of course left in the first instance to the district courts." Circumstances peculiar to the individual case may of course justify the modification or withholding of seniority relief for reasons that would not if applied generally undermine the purposes of Title VII. In the instant case it appears that all new hirees establish seniority only upon completion of a 45-day probationary period, although upon completion seniority is retroactive to the date of hire. Certainly any seniority relief ultimately awarded by the district court could properly be cognizant of this fact. Amici and the respondent union point out that there may be circumstances where an award of full seniority should be deferred until completion of a training or apprenticeship program, or other preliminaries required of all new hirees. We do not undertake to delineate all such possible circumstances here. Any enumeration must await particular cases and be determined in light of the trial courts' "keen appreciation" of peculiar facts and circumstances. . . .

Accordingly, the judgment of the Court of Appeals affirming the District Court's denial of seniority relief to class 3 is reversed, and the case remanded to the District Court for further proceedings consistent with this opinion.

ALEXANDER v. GARDNER-DENVER CO.

7 FEP Cases 81 (Sup. Ct., 1974)

Mr. Justice POWELL delivered the opinion of the Court.

This case concerns the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII of the Civil Rights Act of 1964. Specifically, we must decide under what circumstances, if any, an employee's statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

In May, 1966, petitioner Harrell Alexander, Sr., a black, was hired by respondent Gardner-Denver Company (the "company") to perform maintenance work at the company's plant in Denver, Colorado. In June, 1968, petitioner was awarded a trainee position as a drill operator. He remained at that job until his discharge from employment on September 29, 1969. The company informed petitioner that he was being discharged for producing too many defective or unusable parts that had to be scrapped.

On October 1, 1969, petitioner filed a grievance under the collective-bargaining agreement in force between the company and petitioner's union, Local No. 3029 of the United Steelworkers of America (the "union"). The grievance stated: "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." No explicit claim of racial discrimination was made.

Under Art. 4 of the collective-bargaining agreement, the company retained "the right to hire, suspend or discharge [employees] for proper cause." Art. 5, § 2 provided, however, that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry," and Art. 23, § 6 (a) stated that "[n]o employee will be discharged, suspended or given a written warning notice except for just cause." The agreement also contained a broad arbitration clause covering "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant." . . .

The union processed petitioner's grievance through the above machinery. In the final prearbitration step, petitioner raised, apparently for the first time, the claim that his discharge resulted from racial discrimination. The company rejected all of petitioner's claims, and the grievance proceeded to arbitration. Prior to the arbitration hearing, however, petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission on November 5, 1969.

At the arbitration hearing on November 20, 1969, petitioner testified that his discharge was the result of racial discrimination and informed the arbitrator that he had filed a charge with the Colorado Commission because he "could not rely on the union." The union introduceed a letter in which petitioner stated that he was "knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I . . . have been the target of preferential discriminatory treatment." The union representative also testified that the company's usual practice was to transfer unsatisfactory trainee drill operators back to their former positions.

On December 30, 1969, the arbitrator ruled that petitioner had been "discharged for just cause." He made no reference to petitioner's claim of racial discrimination. The arbitrator stated that the union had failed to produce evidence of a practice of transferring rather than discharging trainee drill operators who accumulated excessive scrap, but he suggested that the company and the union confer on whether such an arrangement was feasible in the present case.

On July 25, 1970, the Equal Employment Opportunity Commission determined that there was not reasonable cause to believe that a violation of Title VII . . . had occurred. . . . Petitioner then filed the present action in the United States District Court for the District of Colorado, alleging that his discharge resulted from a racially discriminatory employment practice. . . .

Pursuant to this statutory scheme, petitioner initiated the present action for judicial consideration of his rights under Title VII. The District Court and the Court of Appeals held, however, that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. Both courts evidently thought that this result was dictated by notions of election of remedies and waiver and by the federal policy favoring arbitration of labor disputes, as enunciated by this Court in Textile Workers Union v. Lincoln Mills . . . and the Steelworkers Trilogy. . . .

Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. . . . There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. . . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

In reaching the opposite conclusion, the District Court relied in part on the doctrine of election of remedies. That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent, has no application in the present context. In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. . . .

There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus, the rationale behind the election of remedies doctrine cannot support the decision below.

We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian process, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to prospective waiver. . . .

The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement,[15] mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. . . .

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[15] In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. . . . As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award. . . .

If an arbitral decision is based "solely on the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of his submission," and the award will not be enforced. Thus the arbitrator has authority to resolve questions of contractual rights, and this authority remains regardless whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

The District Court and the Court of Appeals reasoned that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer, but not the employee, was bound by the arbitral award. In the District Court's words, it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one." . . . This argument mistakes the effect of Title VII. Under the Steelworker's Trilogy, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process. An employer does not have "two strings to his bow" with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices. . . .

The District Court and the Court of Appeals also thought that to permit a later resort to the judicial forum would undermine substantially the employer's incentive to arbitrate and would "sound the death knell for arbitration clauses in labor contracts." Again, we disagree. The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. As the Court stated in Boys Markets, Inc. v. Retail Clerks Union, "a no strike obligation, express or implied, is the *quid pro quo* for an undertaking by an employer to submit grievance disputes to the process of arbitration." It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employee's and the employer's perspective. Moreover, the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic process of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also, has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

Respondent contends that even if a preclusion rule is not adopted, federal court should defer to arbitral decisions on discrimination claims where: (i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy. Under respondent's proposed rule, a court would grant summary judgment and dismiss the employee's action if the above conditions were met. The rule's obvious consequence in the present case would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court.

At the outset, it is apparent that a deferral rule would be subject to many of the objections applicable to a preclusion rule. The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." . . . Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress implicitly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award. . . ." Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

It is evident that respondent's proposed rule would not allay these concerns. . . . As respondent points out, a standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

GEDULDIG v. AIELLO

8 FEP Cases 97 (Sup. Ct. 1974)

Mr. Justice STEWART delivered the opinion of the Court.

For almost 30 years California has administered a disability insurance system that pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation. The appellees brought this action to challenge the constitutionality of a provision of the California program that, in defining "disability," excludes from coverage certain disabilities resulting from pregnancy. . . .

California's disability insurance system is funded entirely from contributions deducted from the wages of participating employees. Participation in the program is mandatory unless the employees are protected by a voluntary private plan approved by the State. Each employee is required to contribute one percent of his salary, up to an annual maximum of $85. These contributions are placed in the Unemployment Compensation Disability Fund, which is established and administered as a special trust fund within the state treasury. It is from this Disability Fund that benefits under the program are paid. . . .

In return for his one-percent contribution to the Disability Fund, the individual employee is insured against the risk of disability stemming from a substantial number of "mental or physical illness[es] and mental or physical injur[ies]." It is not every disabling condition, however, that triggers the obligation to pay benefits under the program. . . . § 2626 of the Unemployment Insurance Code excludes from coverage certain disabilities that are attributable to pregnancy. It is this provision that is at issue in the present case. . . . Appellees are four women who have paid sufficient amounts into the Disability Fund to be eligible for benefits under the program. . . .

At all times relevant to this case, § 2626 of the Unemployment Insurance Code provided:

> ". . . *In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.*" (Emphasis added.)

Appellant construed and applied the final sentence of this statute to preclude the payment of benefits for any disability resulting from pregnancy. As a result, the appellees were ruled ineligible for disability benefits by reason of this provision, and they sued to enjoin its enforcement. The District Court, finding "that the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose," held that the exclusion was unconstitutional under the Equal Protection Clause.

Shortly before the District Court's decision in this case, the California Court of Appeals, in a suit brought by a woman who suffered an ectopic pregnancy, held that § 2626 does not bar the payment of benefits on account of disability that results from medical complications arising during pregnancy. . . . The state court construed the statute to preclude only the payment of benefits for disability accompanying normal pregnancy. The appellant acquiesced in this construction and issued administrative guidelines that exclude only the payment of "maternity benefits"—i.e., hospitalization and disability benefits for normal delivery and recuperation.

. . . Thus, the issue before the Court on this appeal is whether the California disability insurance program invidiously discriminates . . . by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.

It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts. Since the program was instituted in 1946, it has been totally self-supporting, never drawing on general state revenues to finance disability or hospital benefits. The Disability Fund is wholly supported by the one percent of wages annually contributed by participating employees. At oral argument, counsel for the appellant informed us that in recent years between 90 percent and 103 percent of the revenue to the Disability Fund has been paid out in disability and hospital benefits. This history strongly suggests that the one-percent contribution rate, in addition to being easily computable, bears a close and substantial relationship to the level of benefits payable and to the disability risks insured under the program.

Over the years California has demonstrated a strong commitment not to increase the contribution rate above the one-percent level. The State has sought to provide the broadest possible disability protection that would be affordable by all employees, including those with very low incomes. Because any larger percentage or any flat dollar-amount rate of contribution would impose an increasingly regressive levy bearing most heavily upon those with the lowest incomes, the State has resisted any attempt to change the required contribution from the one-percent level. The program is thus structured, in terms of the level of benefits and the risks insured, to maintain the solvency of the Disability Fund at a one-percent annual level of contribution.

In ordering the State to pay benefits for disability accompanying normal pregnancy and delivery, the District Court acknowledged the State's contention "that coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included." There is considerable disagreement between the parties with respect to how great the increased costs would actually be, but they would clearly be substantial.[18] For purposes of analysis the District Court accepted the State's estimate, which was in excess of $100 million annually, and stated that "it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program."

Each of these "variables"—the benefit level deemed appropriate to compensate employee disability, the risks selected to be insured under the program, and the contribution rate chosen to maintain the solvency of the program and at the same time to permit low-income employees to participate with minimal personal sacrifice—represents a policy determination by the State. The essential issue in this case is whether the Equal Protection Clause requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery.

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[18] Appellant's estimate of the increased cost of including normal pregnancy within the insured risks has varied between $120.2 million and $131 million annually, or between a 33% and 36% increase in the present amount of benefits paid under the program. On the other hand, appellee contends that the increased cost would be $48.9 million annually, or a 12% increase over present expenditures.

We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups who are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted under-inclusiveness of the set of risks that the State has selected to insure. Although California has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contribution exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."

The District Court suggested that moderate alterations in what it regarded as "variables" of the disability insurance program could be made to accommodate the substantial expense required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage—short-term disabilities. If the Equal Protection Clause were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.

It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.

The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. . . .

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[20] The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

GRIGGS v. DUKE POWER CO.

3 FEP Cases 175 (Sup. Ct. 1971)

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance,

(b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed. Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two . . . aptitude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Aptitude Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.[3] . . .

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[3] The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. . . .

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action. The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no finding of a racial purpose of invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job-related. . . .

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites fare far better on the Company's alternative requirements" than Negroes.[6] This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in Gaston County v. United States, 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

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[6] In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Part 35, Table 47.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice-president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress had mandated the common-sense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by § 703(h) of the Act. That section authorizes the use of "any professionally developed ability test" that is not "designed, intended, *or used* to discriminate because of race. . . ."

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . .

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. . . .

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ADDENDUM

Since "going to press," a significant number of Supreme Court decisions have been made that clarify, muddle, modify, and add to the rapidly growing body of opinion. Some of these decisions will now be briefly reviewed, deserving considerably more thought and review than accorded herein. It should be noted that these opinions add to and modify some of the material previously discussed.

It was obvious after the *Duke Power Company* and *Albemarle* decisions that the Supreme Court would have to face many additional questions revolving about employment testing. In *Washington v. Davis,* 12 FEP Cases 1415 (1976), the Supreme Court faced questions of constitutionality and legislative interpretation not previously raised. *Duke Power Company* and *Albemarle* arose under Title VII, while in *Washington* the Supreme Court toyed with the Fifth Amendment and section 1981 of the Civil Rights Act of 1866. In the latest Supreme Court pronouncement, several blacks seeking employment on the city police force in Washington, D.C., failed to pass a basic verbal skills test used throughout the federal government. It was conceded that the test was not intentionally discriminatory, an accusation that would be difficult to support. In any event, the defendant established good faith, recruiting affirmatively in a 50-mile radius and 44 percent of the Washington, D.C. police force and new recruits were black. As in *Duke Power Company,* the plaintiff in *Washington* claimed that the effect of the test was discriminatory because considerably more black than white applicants failed. The test was discriminatory, according to the plaintiffs, because it had not been validated and was unrelated to the job, as required in *Duke Power Company* and *Albemarle*. The plaintiffs also claimed that the affirmative recruiting and general good faith was inconsequential given the fact that the black population in Washington, D.C., was considerably higher than 44 percent. The Supreme Court did not address itself to the recruitment area, the 50-mile radius where the black population constituted less than 44 percent of the total population. As previously indicated, demographic statistics for purposes of establishing a violation are difficult to deal with.

Reversing the district court, the appellate court concluded that affirmative recruiting was inconsequential when a test is not job-related, requiring the same approach under the Fifth Amendment and section 1981 as in the Title VII complaints. The suit began in 1970, before Title VII was amended to protect state and federal employees.

Of particular significance was the Supreme Court declaration, reversing the appellate court, that the test-authenticating procedure demanded by Title VII and the EEOC was not demanded by the Fifth Amendment. Thus, intentional discrimination must be established to invoke the protection of the Fifth Amendment; merely because blacks more frequently fail a test than whites, unintentional discrimination, does not lead to constitutional protection. The same could be true under the Fourteenth Amendment.

Had Justice White, presenting the leading opinion in *Washington*, ended at this point, the result would have been quixotic. The use of the Fifth Amendment would mean defeat for future complainants, while reliance upon Title VII would assure victory in light of the strong language in *Albemarle* necessitating the validation of employment tests. To quash possible future charges under Title VII against the city government, Justice White felt that the basic verbal skills test was job-related and had been validated (see footnote 21). Policemen must be able to communicate with society, criminal offenders, make reports, etc., requiring basic verbal facility, and the test accomplished this basic purpose.

Curiously, Justice White did not mention section 1981, although the general language of his opinion may have implied that intentional discrimination is necessary before a violation is properly established. Mentioning this fact was unimportant in *Washington* because Justice White concluded that neither intentional nor unintentional discrimination was evident so that section 1981 could not be violated. Whether intentional discrimination must be proven in other cases necessitates discussion of the intent of Congress under the 1866 law, which was absent. It would be foolhardy to read Justice White's opinion as requiring intentional discrimination when charging a government agency with discrimination while holding a private employer responsible for intentional and unintentional discrimination under section 1981. There is nothing in the 1866 legislation or the congressional record to indicate that public and private employers were to be treated differently. Nor does there appear to be good reason to support such a distinction. Since public and private employers can be held responsible under section 1981, it seems proper to conclude that both categories must be treated alike. The Supreme Court construction, obviously, will force those claiming discrimination by public employers to proceed under Title VII rather than the Fifth Amendment.

Albemarle in strong language approved of the EEOC regulations requiring the validation of all employment tests. Justice Stevens, in a concurring opinion in *Washington*, claimed that a government test widely used was presumed to be neutral in purpose and effect. On the other hand, a private employer using the same test, evidently, cannot claim the same presumption of legitimacy. As previously indicated, the burden of establishing the validity of a test is shifted to the private employer once a disparate effect is established, as in *Duke Power Company,* on the black community. Why the public employer should be treated differently than the private employer was not shown by Justice Stevens (nor did Justice Stevens claim that such an approach was intended by Congress in Title VII disputes).

Another aspect unmentioned by Justices White or Stevens was the possible impact of these opinions upon state employees under state laws. The unanimous opinion reached in *Duke Power Company* was based on the intent of Congress, an intent that was never clear to this writer since section 703 (h) requires "intentional" wrongdoing, and the fact that this provision was added to Title VII to win support for its passage. State legislation, like Title VII, is interpreted to reflect the will of legislators, and the Illinois Supreme Court in *Motorola* did not discuss the effect doctrine. It is possible that the *Motorola* view may become more legally fashionable, requiring evidence of intentional discrimination to establish a violation of a state law. The District of Columbia has a law banning racial discrimination, similar to a state law, which could be interpreted to bar intentional or unintentional discrimination or both.

Perhaps significant in the *Washington* decision was that the verbal skills test was developed by the Civil Service Commission and was not a general purpose test developed by others, as in *Duke Power Company,* for general use.

After *Washington,* the Supreme Court, in *McDonald v. Santa Fe Trail Transportation Company,* 12 FEP Cases 1577 (1976), ruled that white employees can establish reverse discrimination under the Civil Rights Act of 1866 as well as Title VII. Since the 1866 legislation was enacted for the specific purpose of protecting the newly freed black, there was some question as to whether white complainants could seek relief thereunder. In *Santa Fe,* three employees, two white and one black, stole property being shipped by their employer to a customer. The 1866 legislation and Title VII were violated when the two white employees, but not the black employee, were discharged. Absent mitigating evidence that the circumstances warranted disparate discipline, the employer was guilty of racial discrimination against white employees. The employer, clearly, can discharge employees for crimes, but racial favoritism, call it "understanding," is forbidden.

Santa Fe raises the possibility that sex discrimination complaints can be aired under section 1981 even if black men or women are not involved. For the time being, it seems proper to assume that the Supreme Court will only permit the invocation of section 1981 when racial, a factor in *Santa Fe,* as well as sex discrimination is raised.

A decision certain to be controversial is *Brown v. General Services Administration,* 12 FEP Cases 1361 (1976), the Supreme Court ruling that federal government employees must seek redress under Title VII and not the other remedies. That federal employees must rely exclusively on Title VII requires a heap of explaining in light of previous decisions in *Johnson v. Railway Express Agency*, 10 FEP Cases 817 (1975), and *Denver-Gardner*. In these decisions, the Supreme Court endorsed the notion that employees in the private sector can turn to any substantive remedy, that Title VII did not implicitly supercede other remedies. In *Brown*, the complaint made by the federal employees under Title VII was not timely submitted —section 717 (c) requires that a suit must be brought within 30 days after notification by the Civil Service Commission of its decision and efforts. Private and state employees have to sue within 180 days in a federal district court after notification by the EEOC. Why 180 days are permitted employees of private and state employers while 30 days only are alloted to federal employees is not clear, but this was the congressional mandate.

The Supreme Court in *Brown* relied upon the intent of Congress to ban the availability of other remedies. Justice Stewart presenting the majority opinion was obviously troubled, noting that "Congress simply failed implicitly to describe section 717's position in the constellation of antidiscrimination law." Taking the position that federal employees before 1972 did not have a viable alternative when claiming discrimination, Justice Stewart concluded that "(t)he balance, completeness and structural integrity of section 717" indicates strongly that Congress intended Title VII as an exclusive remedy. Justice Stewart however was less than convincing in mustering evidence to back his position. There has been increasing criticism coming from scholarly critics that a multiplicity of remedies was not desirable even for employees in the private sector. However, few or none of the critics indicated that public employees should be more severely restricted than private employees. Perhaps the Supreme Court was responding to this criticism, or perhaps it was the uneasiness exhibited by its members when making decisions of a civil rights nature. In due respect, there are sound reasons for limiting the number of civil rights remedies, but most critics would be hard-pressed to justify a limitation on federal employees alone. The evidence pointed to, like the sovereign immunity of the federal government to suit; the "unambiguous congressional perception . . . to create an exclusive, pre-emptive administrative and judicial remedy" when Title VII specifies in section 717 (e) that agencies and public officials are not relieved of responsibility under the executive orders, Constitution, and other laws; the conclusion that the 1972 amendments were "a careful blend of administrative and judicial enforcement powers" rather than concluding that the Civil Service Commission, like the state fair employment commissions, was already dealing with these problems and there was a congressional unwillingness to disturb the existing structure; and the ease with which congressional will was uncovered in *Railway Express* and *Denver-Gardner* to permit dual remedies, a will apparently not exhibited by Congress in 1972, is not convincing.

While *Brown* concerned the rights of federal employees, municipal and state employees are also entitled to make use of Title VII. These employees are not under the control of the federal Civil Service Commission and can petition the EEOC for relief and sue in a federal district court. There is nothing in the 1972 amendments indicating that municipal and state employees are to proceed differently than private employees. Would Congress, or should Congress since the record is silent, see a need to treat differently state and federal employees? It seems that this question should be answered in the negative.

Another controversial decision made under the equal protection clause of the Fourteenth Amendment is *Mass. Bd. of Retirement v. Murgia*, 12 FEP Cases 1569 (1976). Under a Massachusetts statute, police officers are required to retire after 20 years of service upon reaching 50 years of age. The plaintiff sought to invalidate the state statute, which only applied to police officers, because there was no rational basis for the law, particularly since he was in good physical health, established by medical examination. Reversing the lower court, the Supreme Court upheld the constitutionality of the Massachusetts legislation, citing the following reasons:

1. The job required, upon occasion, considerable physical effort, which older people find difficult. That younger women are on the police force who, as a rule, are even less physically capable than a male over 50; or that technology has been substituted for physical strength; or that those over 50 could be assigned to less demanding work; or that policemen elsewhere are not forced to retire; or that fire fighters and commercial pilots can work after age 50 was not mentioned. Many police officers are assigned to duties not requiring physical exertion, but they too are required to retire under the Massachusetts law. The Supreme Court failed to distinguish between line officers and ranked police officials. The plaintiff was a lieutenant colonel, holding what is essentially a desk job.
2. There is a relationship between chronologic age and decreasing physical capacity. See previous discussion for criticism of this position.
3. Physical examinations may not uncover physical or impending physical disabilities. While recognizing the fact that there is considerable medical opinion to the contrary, the Supreme Court felt that it may be burdensome to require state commissions to individually evaluate each police officer. The Supreme Court was aware that considerable med-

ical evidence is available to the contrary. Medical testimony is available on both sides that can be "bought" honestly, so that testimony favoring retirement at 50 is hardly convincing.

4. The "strict scrutiny" standard (deliberately avoided by this author in previous commentary) requiring considerable evidence and reason to support the need for a state law, was improperly followed by the lower court. To evaluate the constitutionality of a mandatory retirement provision, the "strict scrutiny" standard should not be followed, that such a constitutional standard was only proper when there is interference with "a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 . . . involves neither situation." Accordingly, government employment is not a fundamental right and retirement at 50 is not a suspect classification.
5. Requiring retirement at age 50 is not irrational merely because it is an imperfect test. In all sweet reasonableness is age 50 a valid criterion when the average male lives to 68, many are extremely active physically, and many doctors doubt that physical capacity decreases substantially at 50? There is more acceptable medical evidence to support retirement at age 60.

If we must live with the *Murgia* decision, it should be restricted to few occupations. Even commercial pilots are not required by the FAA to retire before 60 years of age, if in good health. Since *Murgia* did not arise under a state or federal law prohibiting age discrimination, it seems unlikely that the Supreme Court would be able to rely upon the type of analysis displayed in *Murgia* to justify forced retirement at age 50.